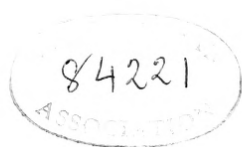




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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

131A

General No. 10304

Agenda No. 3.

O. H. Mendenhall and Reva E.
Mendenhall,

Plaintiffs-Appellants,

vs.

Illini Coach Company, a corporation,

Defendant-Appellee.

Appeal from the
Circuit Court of
Champaign County.

REYNOLDS, J.

This is a suit brought by the plaintiff Reva E. Mendenhall for personal injuries she sustained by a fall on the premises of the defendant and by her husband O. H. Mendenhall for expenses growing out of his wife's injuries. The cause was tried before a jury in the Circuit Court of Champaign County. The jury returned verdicts for the plaintiffs, assessing Reva E. Mendenhall's damages at \$6,500 and O. H. Mendenhall's damages at \$1,200.85. The defendant filed its post-trial motion for judgment notwithstanding the verdict. This motion was allowed by the Court in

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the problem and the objectives of the study.

2. The second part of the report is a review of the literature. It discusses the work of other researchers in the field and identifies the gaps in the knowledge.

3. The third part of the report is a description of the methodology used in the study. It discusses the design of the study, the data collection methods, and the data analysis methods.

4. The fourth part of the report is a presentation of the results of the study. It discusses the findings of the study and compares them with the results of other studies.

5. The fifth part of the report is a discussion of the implications of the study. It discusses the theoretical and practical implications of the findings and suggests directions for future research.

the following language: "Motion for judgment notwithstanding the verdict will be allowed. In the event the Appellate Court overrules that motion then the Court grants a new trial." The plaintiffs appeal to this Court.

There is very little dispute as to the facts of the case. The Mendenhalls had gone to the bus station of the defendant company to meet their 10 year old granddaughter who was to arrive on a bus from Decatur, Illinois. They had entered the waiting room and waited for the bus. Seeing a bus arrive they left the waiting room and walked along the areaway between the bus station and the loading and unloading docks of the buses. This area was about fifteen feet wide. The buses drove between raised dividers, heading into and facing the bus station at an angle, so that when the bus was in the position of unloading, the front of the bus would be about fifteen feet from the outside wall of the bus station. This area was paved with concrete and was smooth and level. The plaintiffs walked along the areaway from the door of the bus station to the bus that was unloading. They estimated some 30 or 40 people were in the area, some with baggage and others without baggage. They stopped near the front of the bus that was unloading and looked for their granddaughter. The weather was

without having any

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

clear and it was about 3:30 o'clock P.M. Passengers were moving in the areaway, either going to or from the bus. No one jostled or bumped into Mrs. Mendenhall. They did not see the granddaughter and Mr. Mendenhall walked away from his wife to the front of the bus and saw that it was a bus to Chicago. He rejoined his wife, who was standing still and told her it was the wrong bus and that they would go back into the bus station and wait. Mrs. Mendenhall had stood still some three or four minutes before Mr. Mendenhall rejoined her. She heard no one put a piece of baggage down, or the noise of anything being deposited on the pavement. She turned to go and fell. She testified that from the time she left the waiting room until she fell she did not look for any baggage on the pavement and admitted that if she had looked she would have seen any if it had been there. She did not see any baggage or traveling case at any time, at or near where she fell. She did not remember tripping or stumbling over anything. Her husband testified that there was a suitcase about 24 inches long, 15 inches high and 5 inches deep under his wife when he looked and saw her lying on the pavement. He did not see her fall and did not see her trip on the suitcase, but saw it lying there when he got to her. Two other witnesses

who were present immediately after the fall of Mrs. Mendenhall, testified they saw no suitcase and could have seen one if it had been there. Mrs. Mendenhall sustained a broken patella or knee cap from her fall.

No serious question is raised in the appeal as to the pleadings, the instructions, or the exhibits. The only disputed question of fact is the presence of the suitcase, which is established only by the testimony of Mr. Mendenhall. There is no evidence that the pavement was slippery or wet, or that any employee of the defendant had placed anything on the pavement that caused the fall of Mrs. Mendenhall. There is no evidence that the defendant had any knowledge at any time that any substance or object was on the pavement at or near where Mrs. Mendenhall fell.

The defendant argues that the Mendenhalls were licensees only. We do not agree. The pavement where Mrs. Mendenhall fell was provided for the convenience of passengers of the bus lines and persons meeting the buses. It is true that there was a waiting room provided for such persons and that there was no necessity for the Mendenhalls to go on to the loading and unloading area, except to assist their granddaughter when she alighted from the bus. However, it seems from the testimony that other persons using the bus station, either

as passengers or persons meeting passengers, did go to the place where buses would load or unload. This seemed to be a common practice and was not forbidden or objected to by the bus line. We do not think that the actions of the Mendenhalls, without invitation going to the unloading area, would constitute them trespassers or even mere licensees. They were meeting a small child who was arriving on a bus of the defendant company, and as such, in going on the loading area to meet the child, they were business invitees, and the defendant owed them the duty to keep the loading area in a reasonably safe condition. This duty is only to exercise reasonable care to make the premises as reasonably safe as may be consistent with the operation of the business for the safety of a person while on that portion of the premises required for the purpose of his visit. The fact that the defendant in this case was a common carrier does not vary the rule. As said in Davis v. South Side El. R. R. Co., 292 Ill. 378, at page 381: "There is really no valid reason why a railroad company should be held to a higher degree of care in maintaining its station buildings than that to which an individual owner of buildings used for ordinary business purposes is held." And the Court in that case held the railroad must exercise only reasonable and

The following information was obtained from the records of the
 Bureau of the Census, Department of Commerce, for the years 1940
 through 1949, inclusive, showing the number of persons who
 were born in the United States and who were of the
 following race and color:

Race and Color	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949
White	1,234,567	1,245,678	1,256,789	1,267,890	1,278,901	1,289,012	1,290,123	1,301,234	1,312,345	1,323,456
Black	123,456	124,567	125,678	126,789	127,890	128,901	129,012	130,123	131,234	132,345
Other	12,345	13,456	14,567	15,678	16,789	17,890	18,901	19,012	20,123	21,234

The above information was obtained from the records of the
 Bureau of the Census, Department of Commerce, for the years 1940
 through 1949, inclusive, showing the number of persons who
 were born in the United States and who were of the
 following race and color:

ordinary care as to its station. In this case we must hold that the defendant owed the persons using its loading and unloading area only ordinary care to make the premises reasonably safe for the persons using it. It was not an insurer of the safety of persons using the area for the purpose of using the buses or meeting passengers of the buses. The position of the defendant may be correct and the plaintiffs were mere licensees upon the property of the defendant, but assuming, for the purpose of this opinion, that they were business invitees, the duty owed them by the defendant was to exercise only reasonable and ordinary care for their safety.

Treating the plaintiffs as invitees upon the property of the defendant, an inspection of the testimony fails to disclose any negligence on the part of the defendant. Mr. Mendenhall says he saw a suit-case or piece of luggage under his wife after she fell. If it was there, there is no evidence that it caused the fall of Mrs. Mendenhall. Mrs. Mendenhall testified she was not jostled or bumped into at any time. She did not remember tripping over the suit-case or luggage and there is no evidence that she did trip or stumble over it. There is no evidence of any slippery surface or object that might have caused a slippery

surface at the place of Mrs. Mendenhall's fall. There is no evidence that any employee of the defendant in any way contributed to or was in any way connected with the fall of Mrs. Mendenhall. There is no evidence that the suit-case or piece of luggage Mr. Mendenhall saw had been there for any period of time or that any employee of the defendant knew or should have known of its presence. There is no evidence that any condition existed at the place of the fall long enough to constitute notice to the defendant. Even if the suitcase was there as testified by Mr. Mendenhall there is no evidence to show who put it there, and no evidence that any employee of the defendant put it there. The only issue in this case is whether, under the facts and circumstances most favorable to the plaintiffs, there was any evidence of negligence by the defendant in the maintenance of its premises. And, this court, reviewing all the evidence for the plaintiffs, must hold there was a total lack of evidence showing negligence, express or implied, on the part of the defendant.

For the reasons stated the judgment of the trial court granting the motion notwithstanding the verdict and entering judgment for the defendant will be affirmed.

Judgment affirmed.

CARROLL, P.J. and ROETH, J., concur.

[illegible]

Journal of Management Studies, 1986, 23(1), 7-10.

CAIRO, EGYPT, 1952

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Abstract

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10315

Agenda No. 1

People of the State of Illinois,)	
)	
Plaintiff-Defendant in Error,)	Error to
)	County Court of
vs.)	Douglas County
)	
Herman Chancellor,)	
)	
Defendant-Plaintiff in Error.)	

ROETH, Justice.

This case is before this court on a writ of error to review the judgment of the County Court of Douglas County.

The States Attorney has made a motion in this court to strike the brief and argument of plaintiff in error and to dismiss the appeal, which motion was taken with the case. The motion calls attention to a violation of Rule 7 of this court and other glaring insufficiencies in the brief and argument. While there is merit in the motion, we have concluded that the ends of justice will best be served by a review of the record.

At the outset we call attention to the fact that only the common law record is filed in this court. No report of proceedings was filed either in the trial court or in this court. Under the

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1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

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The results of the study are discussed in relation to the existing literature on the topic.

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well established rule, this court will therefore only look to the matters properly contained in the common law record and will affirm unless such record discloses prejudicial error.

The record before us, at the outset, shows that the April Term 1960 of the County Court of Douglas County, Illinois, was duly and regularly organized and convened with the required officers present. It further shows that on April 18, 1960, the County Court of Douglas County, Illinois, was duly and regularly convened pursuant to adjournment, for the transaction of business, with the required officers present. The record shows that on April 18, 1960, the States Attorney of Douglas County filed an information in said County Court against plaintiff in error, charging in count 1 that plaintiff in error did, on April 16, 1960, operate a motor vehicle upon a public highway while under the influence of intoxicating liquor and also charging in count 2 that plaintiff in error did on April 16, 1960, operate a motor vehicle upon a public highway with a wilful and wanton disregard for the safety of persons and property. We have examined the information and find that it is legally sufficient to charge the crimes covered by the statute, i. e. driving while intoxicated and reckless driving. Upon the filing of this information bail was fixed at \$500.00 and capias was ordered to issue instantler. The capias was served on plaintiff in error and

he was brought before the County Court pursuant to the command of the writ.

The record before us further shows that thereafter plaintiff in error was personally present in open court and was furnished with a copy of the information; that he was thereupon arraigned and entered a plea of guilty to the information and each count thereof; that he signed and filed a written waiver of jury trial; that he was admonished and the consequences of his plea were explained to him; that he persisted in the plea of guilty and that the plea of guilty was accepted by the court. The record then shows that plaintiff in error was adjudged guilty of driving while under the influence of intoxicating liquor as charged in count 1 and of reckless driving as charged in count 2. The record before us then shows a hearing in mitigation and aggravation, followed by a sentence to the Illinois State Penal Farm at Vandalia, Illinois, for 6 months under count 1 and the imposition of a fine of \$100.00 under count 2.

The foregoing are the only matters which we can consider on review. The record shows that all requirements of the law were complied with after defendant's plea of guilty. Having examined these matters, we come to the inevitable conclusion that the judgment of the County Court of Douglas County must be affirmed.

Affirmed.

Presiding Justice Carroll and Justice Reynolds concur.

he was brought before the court with payment of the
the writ.

The record before the court shows that the defendant

in error was personally served with a writ of habeas corpus

with a copy of the writ of habeas corpus and a return

and returned a return to the writ of habeas corpus

showing that he was not a citizen of the United States

and that he was not a citizen of the United States

to the effect that he was not a citizen of the United States

of guilty was accepted by the court for the reason

plaintiff in error was not a citizen of the United States

influence of and a return to the writ of habeas corpus

reckless driving a charge in error of the writ of habeas corpus

shows a hearing in mistake and a return to the writ of habeas corpus

to the Illinois State Court of Appeals, Illinois, and a return

under count 1 and the imposition of a term of 10 years

The foregoing are the facts of the case which were

reviewed. The record shows that the defendant was not a

compiled with a list of names of persons who were not

these matters, we come to the conclusion that the

Judgment of the County Court of Sangamon County is

affirmed.

Presiding Justice Carroll and Justice

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Abstract

General No. 10321

Agenda No. 17

Jack J. Maxwell,

Plaintiff-Appellee,

vs.

Oakley Franklin,

Defendant-Appellant.

Appeal from the
Circuit Court of
McLean County

23-1-33

CARROLL, Presiding Justice.

This is an action for personal injuries and property damage arising out of an intersectional automobile collision. A jury returned a verdict for plaintiff. The trial court overruled defendant's post-trial motion and entered judgment on the verdict. The defendant has appealed.

The grounds upon which reversal is sought are that the plaintiff was guilty of contributory negligence as a matter of law; that the trial court erred in refusing to give certain instructions tendered by defendant; and in not allowing a witness for defendant to testify as to the presence of skidmarks and the location of the automobiles following the collision.

The accident occurred at an intersection of two gravel roads in a rural area. There were no stop signs on either highway.

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The time was approximately noon and the weather was dry and clear. Plaintiff was driving east and defendant, who was travelling north, approached the intersection on plaintiff's right. The gravel portion of both roads was approximately 16 feet wide. A cornfield separated the two roads at the southwest corner of the intersection, but at the time of the accident the height of the crop did not obstruct the vision of either driver. Both roads were fairly level as they approached the intersection with the north and south road rising slightly. The only occurrence witnesses were the parties to the suit. Plaintiff testified that when he was 1/2 mile west of the intersection he was driving at between 45 and 50 miles per hour; that as he approached the intersection he slowed down to approximately 20 to 25 miles per hour; that he was at that time driving in the center of the road where there were car tracks in the gravel; that he looked both ways before entering the intersection; that when he was 4 car lengths or 40 to 50 feet from the intersection he saw defendant's car which was then 9 or 10 car lengths from the intersection; that the speed of defendant's car was 50 to 55 miles per hour; that when he entered the intersection defendant's car was 60 feet from the intersection; that he did not continue to watch defendant but applied the brakes as fast as he could; that at the time he applied the brakes he knew there was going to be a collision; that when he applied his brakes he slid his wheels; that he was in the intersection first; that after entering the intersection he veered to the left; that he was almost stopped at the time of the actual impact; that he was about across the intersection when defendant entered it; that the

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two cars collided in the northeast corner of the intersection; that his car was then approximately 4 to 5 feet from a ditch on the east side of the north and south road; that the collision happened north of the center of the east and west road; that his car was struck at a point $1\frac{1}{2}$ feet behind its right headlight; and that the impact carried his car north of the intersection. Photographs in evidence show extensive damage to the right side of plaintiff's car with the damage to defendant's car confined principally to the left front.

The defendant testified that he saw plaintiff's car before the collision when it was 3 or 4 car lengths from the intersection; that at that time he imagined his car was the same distance from the intersection as was the plaintiff's; that he estimated his speed at 50 miles per hour; that after he first saw plaintiff's car he continued to watch it until the collision; that he could not say whether or not he applied his brakes; that he did not know the speed of plaintiff's car; that he did not attempt to slow down until he saw plaintiff's car; that he did not see plaintiff slow down; that both cars entered the intersection at the same time; that he saw plaintiff enter the intersection; that his car struck plaintiff's car somewhere between the front wheel and bumper; and that the point of collision was in the center of the intersection.

Defendant's contention that plaintiff was guilty of contributory negligence as a matter of law raises the question whether there is in this record any evidence which with the legitimate inferences that may reasonably be drawn therefrom taken in its aspect most favorable to plaintiff, fairly tends to show the exercise of due care on the part of the plaintiff. If there is any such evidence,

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then, as our courts have held in innumerable cases, the question of due care is one for the jury. McDonald v. Stiner, 342, Ill. App. 651; Dee v. City of Peru, 343 Ill. 36; Pantlen v. Gottschalk, 21 Ill. App. 2d, 163. It becomes a question of law only where the evidence establishing due care is so clearly insufficient that all reasonable men would of necessity concur in the conclusion that the plaintiff was guilty of contributory negligence. Berg v. New York Cent. RR Co., 391 Ill. 52.

Defendant argues that the conduct of plaintiff at or immediately prior to the occurrence was no different than that of defendant and if the latter was negligent then plaintiff was likewise guilty of negligence which contributed to his own injury; that plaintiff failed to prove by a preponderance of the evidence that he was free from contributory negligence; and that plaintiff was therefore guilty of such negligence as a matter of law. Such argument is not relevant to the question whether the trial court erred in refusing to direct a verdict for defendant. As indicated by the authorities cited, in passing upon such question, the record is reviewed for the purpose only of ascertaining whether it contains any evidence without regard to its weight which taken most favorably to plaintiff tends to prove that he was in the exercise of due care. Comparison of his conduct with that of the defendant is not involved. There is evidence that as plaintiff approached the intersection he reduced the speed of his car to 20 to 25 miles per hour; that he locked both ways before entering the intersection; that when he was within 40 feet of the intersection the defendant was 90 to 100 feet away from him; that plaintiff entered the intersection first; and

then, as our courts have held in numerous cases, the
the case in one for the town. Wichita v. Linton, 175, 75.
1911, 190, 191. The court's decision is in only 1 in the
evidence established in each of the four instances. It is all
reasonable and sound. It is a well-known fact that the
Kinsley was built in 1911. It was built in 1911. It was built in 1911.
Court, 1911, 191, 192.

[illegible]

that after entering the intersection and when he saw there was going to be a collision he applied his brakes. While there is a conflict in the evidence as to where the two cars collided, plaintiff's testimony was that the collision took place in the northeast quarter of the intersection. In view of this evidence we are unable to say that all reasonable men would reach the conclusion that plaintiff was guilty of contributory negligence.

As emphasized by our reviewing courts upon numerous occasions, contributory negligence becomes a question of law only in those exceptional cases where the lack of care on the plaintiff's part is so manifest as to compel reasonable minds to conclude that his conduct was not that of an ordinarily prudent person. The facts in this case did not present a situation where the plaintiff, before entering the intersection, failed to look for cars approaching on another highway. Here the evidence shows plaintiff saw the other car approaching. Taking into account the relative distance of the two cars from the intersection and their speed when plaintiff first saw defendant's vehicle, we think the question as to whether ordinary care required him to stop and yield the right of way was properly left to the jury.

Defendant further contends that plaintiff, as a matter of law, was guilty of contributory negligence in failing to yield the right of way to defendant.

So far as is pertinent here, the right of way statute provides as follows:

that after entering the ... the ... was ...
to be a collision between the ... and ...
in the evidence as to what the ... did ...
may be that the ... was ...
the intersection. In view of this ...
all responsible men would ...
guilty of contributory negligence.

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in those exceptional cases where ...
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new ...
care required him to stop ...
left to the jury.

Defendant further contends that ...
law, was, guilty of contributory negligence ...
right of way to defendant.
So far as is pertinent here, the ...
provided as follows:

"The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

"When two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right."

Sec. 165, Chap. 95¹/₂, Illinois Revised Statutes, 1953.

The two situations covered by the statute are (1) where one of the vehicles entered the intersection first and (2) where both vehicles entered at the same time. In this case the evidence bearing on the question as to which driver was required to yield the right of way is in conflict. Since there was evidence tending to prove that plaintiff had gained the intersection when defendant entered it, the question as to which driver had the benefit of the right of way as conferred by the statute was for the jury.

Defendant complains of the trial court's refusal to give defendant's Instructions 8 and 9. Instruction 8 reads as follows:

"If you believe from the evidence, under the instructions of the Court, that the degree of care required of said plaintiff for his own safety, as defined in these instructions, required him before entering the intersection to look and ascertain whether said highway was clear or whether an automobile was approaching, and that the plaintiff by the exercise of such care, should have looked and ascertained whether such intersection was clear, and from the evidence that if the plaintiff had looked he could by the exercise of ordinary care have ascertained whether or not an automobile was approaching, and if the Jury believe from the evidence, under the instructions of the Court, that the plaintiff did not so look and ascertain whether the north-south road was clear or whether or not an automobile was approaching, and that he was injured in consequence of his failure to so look and ascertain, if he did so fail, then the plaintiff is guilty of contributory negligence."

We think this instruction attempts to tell the jury what particular act the plaintiff shall do to be in the exercise of due care. The refusal of such an instruction has been approved in numerous cases. Adamsen v. Magnolia, 286 Ill. App. 412; Peters v. Madigan, 262 Ill. App. 417; Chicago & Eastern Ill. RR Co. v. Huston, 196 Ill. 480. Furthermore, in the instant case there is no evidence that plaintiff failed to look for approaching traffic. His uncontroverted testimony was that he looked in both directions and saw defendant's car approaching. We also think this instruction suggests a hypothetical situation which the evidence fails to establish. There is no evidence that plaintiff failed to look for traffic approaching the intersection on another highway. The evidence on that subject was plaintiff's testimony that he looked in both directions before entering the intersection and saw defendant's car approaching. It has always been the rule that an instruction must be based upon evidence in the case. If Instruction No. 8 were given the jury might well believe that failure of the plaintiff to look rendered him guilty of contributory negligence regardless of when or under what circumstances he so failed. All of the facts as to the lookout which plaintiff maintained were before the jury and they in determining whether he exercised ordinary care should not have been hampered by suggestions from the court as to what the evidence did or did not show.

Instruction No. 9 stated in substance that there is a duty to keep a lookout; that if plaintiff failed to keep a lookout which was a contributing cause of his injury, then such failure was contributory negligence. What we have said concerning Instruction 8 would seem to be applicable to Instruction 9. It is well settled

that one driving an automobile upon the public highway must be on the lookout for other cars and must use every reasonable precaution to avoid collision, but under the circumstances surrounding the collision in this case, it was for the jury to determine what kind of a lookout would be required of the plaintiff to avoid being guilty of contributory negligence.

It further appears from other instructions that the jury were fully informed as to what care was required of plaintiff in order to entitle him to recover. Defendant's Instruction 11 explained the duty of both drivers under the right of way statute and stated that:

"When two motor vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the driver on the right, if, from a consideration of the relative speeds and distances from the intersection of the two vehicles prior to entering the intersection, a collision will result unless such right of way is granted."

We have examined all of the instructions and are convinced that the jury were fully instructed as to the law applicable to the case.

Defendant also contends it was error for the court ^{not} to permit a witness who arrived upon the scene sometime after the accident to testify as to the position of the cars and the presence of skidmarks in the intersection. The record shows that on the trial defendant's counsel conceded his inability to show that the cars had not been moved or whether other traffic had passed over the intersection between the time of the accident and witness's arrival. In such

that one driving an automobile upon the public highway must be on the lookout for other cars and must use every reasonable precaution to avoid collision, but when the situation and conditions are such that collision in this case, is not the duty of the driver, with a view of a lookout would be required of the driver to avoid collision, it is not a duty of the driver to avoid collision.

[illegible][illegible]

that the jury were fully informed as to the facts of the case.

between the time of the accident and witness's arrival. In such cases, the witness's testimony is given more weight than the testimony of the defendant. The reason for this is that the witness is more likely to be truthful than the defendant, who has a strong incentive to lie.

situation the trial court did not err in sustaining plaintiff's objection to the testimony of this witness.

We find no reversible error in this record and accordingly the judgment of the circuit court is affirmed.

Affirmed.

REYNOLDS and BOETH, JJ., concur.

REYNOLDS AND COMPANY, 111, COLUMBIA

Gen. No. 11366

Page 1

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND DISTRICT - SECOND DIVISION
 OCTOBER TERM, A. D. 1960

FILED

FEB 24 1961

PAUL V. WUNDER
 Clerk Appellate Court Second DistrictWALTER T. SCHNAURSTEIN, and
 WILLIAM HANSEN,

Plaintiffs-Appellees,

vs.

STEPHEN L. BARZSO,

Defendant.

STEPHEN L. BARZSO,

Counter-Plaintiff, Appellant,

vs.

CITY OF CHEATON, a Municipal Corporation,
 WALTER T. SCHNAURSTEIN, and
 WILLIAM HANSEN,

Counter-Defendants, Appellees.

On the Appeal of STEPHEN L. BARZSO,

Counter-Plaintiff, Appellant.

appeal from the
 Circuit Court of
 DuPage County.

CRO , P. J.

This is an appeal by the counter-plaintiff Stephen L. Barzso from a verdict and judgment in favor of the counter-defendants City of Cheaton, a Municipal Corporation, Walter T. Schnaurestein, and William Hansen. The counter-plaintiff had charged the counter-defendants with both negligence and wilful and wanton misconduct. The jury by its answers to special interrogatories found both the counter-plaintiff and the counter-defendants guilty of negligence but also found them all not guilty of wilful and wanton misconduct. A general verdict was returned against the counter-plaintiff Stephen L. Barzso and in favor of the counter-defendants. Judgment was entered on the verdict, the counter-plaintiff's post trial motion was

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PAUL V. WUNDER
102 DIVISION

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denied, and the counter-plaintiff appeals.

This suit grows out of a collision between a squad car owned by the City of Cheaston and operated by Walter F. Schaurstein and in which William Hansen was riding. Walter F. Schaurstein and William Hansen were police officers of the City of Cheaston. The squad car collided with a station wagon being driven by Stephen L. Barzoo on March 7, 1958 at approximately 6:00 o'clock p.m. at the intersection of routes 64 and 53. The squad car was east bound on route 64 and Barzoo was proceeding south on route 53. It is conceded that the squad car was an emergency vehicle and on an emergency run at the time of the collision. The squad car and the station wagon were badly damaged and Barzoo suffered serious injuries. Schaurstein and Hansen were the original plaintiffs in this action against Barzoo, but after the close of the original plaintiffs' evidence, their case was dismissed, and the trial proceeded on Barzoo's counterclaim for personal injuries and property damages.

The counter-plaintiff appellant asserts that the jury's finding that the counterdefendants were guilty of negligence is supported by the weight of the evidence, but the jury's finding that Barzoo was also guilty of negligence and their failure to find the counter-defendants guilty of wilful and wanton misconduct are against the manifest weight of the evidence, and, further, that the verdict was the result of error in the admission and exclusion of evidence, instructions to the jury, and alleged inflammatory arguments of counsel for the counter-defendants to the jury.

The counter-defendants assert that the counter-plaintiff had a fair trial and the verdict is amply supported by the evidence,

that there was no error in the instructions tendered by the counter-defendants and given, nor any reversible error in the argument to the jury by the counter-defendants' attorney, or in rulings upon the evidence.

The facts of the occurrence are substantially as follows:

The counter-defendants Johnurst, and William Hansen, police officers, received an assignment from Sgt. Hale of the Wheaton Police Department to make an emergency call. They immediately ran to their squad car which was equipped with a red wars light mounted on the roof, two spotlights, a siren, and a radio. Officer Hansen sat in the right front seat, while Officer Johnurst got into the driver's seat. Upon entering the car Officer Hansen turned on the spotlight located on the right front side of the vehicle and Officer Johnurst turned on the headlights, the red wars light and the siren. Their assignment was to transport a child, together with Mrs. Cornelia Henderson, to the Wilmhurst Memorial Hospital. Between the Henderson home and Route 64, Officer Hansen received a radio message from Police Headquarters in Wheaton. Officer Hansen informed the radio operator of the route that the squad car would take to Wilmhurst Hospital. The radio operator informed Hansen that the villages located between Wheaton and Wilmhurst had been notified of the emergency run and the route the squad would take. The squad car turned right at North Avenue and proceeded east in the inner eastbound lane. Traffic pulled into the outer lane as the squad car passed. The wars light, the spotlight and the siren were in continuous operation. As Officer Hansen would flash the spotlight onto cars proceeding east in front of the squad car the drivers of those vehicles would pull to the outer lane of the high-

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way and allow the squad car to pass. The car had to be so spotted three times before it would remain stopped. When the squad car was approximately two blocks west of the intersection of routes 14 and 53, Officer Hansen observed that the traffic light was red for eastbound traffic on route 14. The squad car was proceeding east against a northeast wind at 7 mph. It moved in and out of traffic at that point at approximately 60 mph. When the squad car was 600 feet west of the intersection Officer Schnurstein observed a car, northbound on route 53, begin to enter the intersection. He applied the brakes on the squad car and reduced its speed approximately 5 mph. Shortly thereafter, that vehicle, the northbound car driven by a Mr. Berndt, stopped. When the squad car was approximately 200-300 feet from the intersection, Officer Schnurstein again observed that same vehicle northbound on route 53 begin to enter the intersection. It finally stopped and remained stopped. Schnurstein applied his brakes. When the squad car was approximately 100 to 150 feet west of the intersection Officer Schnurstein first observed a vehicle southbound on route 53. That vehicle, driven by Mr. Barzoo, was approximately 75-100 ft. north of North Avenue and traveling at a rate of speed of approximately 45-50 mph. Officer Schnurstein then applied the brakes on his vehicle - fourth time reducing its speed to 40 mph. He again continued to apply pressure to the brakes and the vehicle then skidded from that point into the intersection.

Officer Schnurstein testified that Mr. Barzoo's vehicle neither increased nor decreased its speed nor changed its direction from the time he first observed it up to the time of the impact. During this entire interval of time, the siren on the squad car was screaming continuously at a high pitch, and the emergency light was flash-

ing constantly. He did not know the color of the traffic light for eastbound traffic when he entered the intersection.

Cornelia Henderson, a passenger in the squad car, testified that when the car started on its emergency run the siren was blaring, and its wars light was flashing, that when the car was approximately one block west of the intersection of routes 64 and 53 she observed the traffic light located at the intersection change from green to red for eastbound traffic on Route 64; that the squad car narrowly missed collision with other vehicles at two different points on the route.

John Chopp, an attendant at a Cities Serv co gas station, which faced north at the southeast corner of routes 64 and 53, testified that at about 6:00 p.m. he was in the station changing his shirt when he heard a siren and he looked out the garage door window and saw a red dome light flashing. When he first saw the squad car it was one block west or left of the gas station in the inner eastbound lane closest to the centerline. He could not estimate the speed of the squad car at that time but as it passed the gas station he estimated the speed at about 60 mph. He saw the southbound station wagon just before it was struck. He estimated the speed of the station wagon at 35-40 mph. When the squad car was about 40 feet west of the point of impact its front end went down and the rear up, as from an application of the brakes. The squad car went through the red light and the impact occurred in just a matter of seconds. The siren blew continuously from the time he first heard it until he saw the impact. He estimated the lapse of time was about 30 seconds from the time when he first observed the squad car until the impact occurred.

Lothar A. Reissler, another Cities Service gas station attendant, testified substantially to the same effect as Louis Snopp. He estimated the speed of the squad car at about 50-55 mph.

William McConelli, a Shell gas station attendant, on the opposite corner of the same intersection, testified that he saw the occurrence from inside the station looking out a window. He estimated the speed of the squad car at 80 mph and the speed of the southbound vehicle on Route 53 at 30 mph.

The intersection itself was four lanes in all directions, 40 to 45 feet square. It is undisputed that Barzso approached and entered the intersection with the green light.

After the accident Barzso was unconscious and taken to the hospital. He suffered a severe cerebral cranial injury or concussion, a comminuted fracture of a leg, and retrograde amnesia or lack of memory. He remained unconscious until the afternoon of the fifth day of his hospitalization. As a result of the accident he was unable to remember or give any facts about the occurrence. An offer of proof of Barzso's careful and cautious habits was made, which the court denied.

The northbound vehicle referred to by Officer Wchnurstein as having been driven by Mr. Gerndt on Route 53 and coming to a complete stop was in the outer northbound lane of Route 53. Gerndt testified that he was alone in his vehicle and had stopped at the red light at the intersection intending to turn right on to Route 64. When the traffic light regulating northbound traffic on Route 53 turned to green he accelerated his car. He then heard a siren

and described its sound as faint, - one window in his car being only half open. He looked first to the right, then straight ahead and to his left, and at his left saw a flashing red rear light atop the squad car. It was then two blocks away. Harndt then shifted his car into reverse and backed up 5 or 6 feet. He first observed the car driven by Barzee when it was approximately one block north of the intersection. He estimated its speed at between 30 and 40 mph and it continued southbound without reducing its speed.

Dr. Leonard C. Hardy, an acoustical engineer, was called by the counter-plaintiff appellant and gave evidence regarding the principles of propagation of sound emitted by sirens. He testified that he was familiar with a Federal Enterprise siren, model #1, with a 12 volt battery, such as was on the eastbound squad car. His testimony was based upon theoretical projections of the results of various tests which he had made, and in his opinion a field test would produce results very close to the theoretical propositions to which he testified. In his opinion, wind velocity of less than 20 mph would have no practical effect upon the effective range of sound. When car windows are closed the sound entering it is attenuated by transmission through the car but upon opening the car window it is easier for a sound to enter but then there is more noise coming outside as well and it tends to cancel out. From a distance of 150' from the source of sound, the direction of wind makes a large difference on the propagation of sound. A sound moving against or facing the direction of a wind decreases faster than at the rate of six decibels because sound facing a wind direction is fended upward. Based upon acoustical theory, Dr. Hardy stated that in his opinion

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the driver of a vehicle southbound on route 53 could first hear the sound of the siren of a squad car on route 64 when the southbound vehicle could be approximately 100' from the intersection; if an eastbound car travels 40 mph to the southbound collision with a southbound car traveling 40 mph, the siren time while the siren could be heard by the southbound driver was 1.5 seconds. Mr. Murry was informed that at the time of this collision the wind was blowing in a northeasterly direction at approximately 7 mph at Hart Field approximately 10 miles from the scene of the accident. There was no information given as to the wind velocity at the time and place in relation to any meteorological conditions existing at that time and place. It is considered that the squealing of brakes could be applied, in such a manner that the front end of a car goes down and wet parts spark upon scraping the pavement, will make a sound approximately as intense as that of the siren itself. If the southbound squad car applied its brakes thus applied, the squeal of the brakes could produce a sufficient background noise to drown out the siren.

In rebuttal to this testimony, the counter-claimant appellees called James A. Goodell, a registered professional civil engineer, and Edgar E. Webster, a registered land surveyor, who conducted certain field tests regarding the propagation of sound and gave the results of those experiments. Two series of experiments were conducted at the intersection of routes 64 and 53. Over objections, the results of these experiments were admitted in evidence. In the first series, the wind was blowing gently from the south. In the first two tests a car was parked on route 53 at a point 500 feet north of route 64. A squad car then proceeded eastbound at 40 mph and its siren was heard when it was more than 1100 feet west of the

intersection. In the next two tests, the car was parked 300 feet north of Route 64, and the siren of the squad car proceeding at 40 mph was heard when the squad car was 1385 feet and 1500 feet, respectively, west of Route 53. In the fifth and sixth tests, a squad car was parked 500 feet north of Route 64, and the other car traveling first east and the next time west to Route 53, did not hear the squad car siren until it hit the intersection or was practically right at it. In the seventh test, a squad car was parked 1000 feet west of Route 53 and a southbound car heard the squad car siren 1400 feet north of Route 64, the sound coming from the direction of the wind toward the listener. On the eighth test, a squad car was 500 feet west of Route 53 and the other car southbound on Route 53 heard the siren 250 feet north of Route 64. The remaining tests were conducted in the afternoon when the wind was blowing from the west. In the first test, a squad car was parked 250 feet north of Route 64 and the other car eastbound heard the siren 200 feet west of Route 53. In the last two tests, a squad car was 200 feet north of Route 64 and the other car eastbound did not hear the siren against the wind until it got as close as 325 feet and 375 feet, respectively, from the intersection.

It is one contention of the counter-plaintiff appellant that it was prejudicial error to admit in evidence the results of these tests or experiments by Messrs. Woodell and Webster as to the audibility of a siren made under conditions and circumstances allegedly substantially dissimilar from those prevailing at the time of the occurrence here involved. It is true that in none of the experiments conducted by Woodell and Webster were there two moving cars used, and the persons conducting the tests could not agree whether

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the test speeds were 40 or 50 mph, and in the first series of tests the wind was blowing from the south and in the second series of tests the wind was blowing from the west. The counterplaintiff appellant cites FRANK SMITH, JR. v. FORD CO. (1934) 114 Ill. App. 106, and SMITHLY adm. v. FORD (1941) 314 Ill. App. 207, holding that where experiments are made under essentially dissimilar circumstances than prevailing at the time of the accident it is error to admit such testimony. We do not disagree with these holdings. However, the similar evidence of Mr. Merdy of the experiments conducted on behalf of the counterplaintiff appellant, although objected to, was admitted, and as we view this case the counter-plaintiff appellant cannot object now to the quality of the similar evidence offered by the counter-defendants when he was guilty of offering the same type of evidence himself in chief.

The counter-plaintiff appellant further contends that he was prejudiced by the action of the trial court in refusing to admit proof of the careful habits of Baraso. With this we cannot agree. We are satisfied from the record that there were eye witnesses to this occurrence. When there are eye witnesses who testify to the facts and circumstances surrounding the injury or occurrence the jury must determine therefore whether the counter-plaintiff was careful or negligent, and evidence of his careful habits is not admissible under those circumstances: FRANK SMITH, JR. v. FORD CO. (1934) 114 Ill. 236.

Another contention of the counterplaintiff is that counsel for the counter-defendants made inflammatory remarks to the jury which were calculated to and did prejudice the jury against him.

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It appears that counsel for the counter-defendants in the course of his argument said in part - "No. 2, we know that applying to that conduct the test of the law that each man is required to exercise reasonable care and caution for his own safety and for the safety of others, he has failed to measure up to that test. That becomes significant and accounts, in my opinion, for the pressure that has been put upon you to stigmatize Mr. Schnurstein's conduct as wilful and wanton. It accounts for Mr. Jacobs' request for you to say by your verdict and by your answers to interrogatories, 'You, Mr. Schnurstein, are a killer.' " An objection was made to this and the objection sustained. It appears, however, that counsel for the counter-plaintiff in his argument had commented that Officer Schnurstein was not only given an automobile but was also given a gun; that the life of the counter-plaintiff was jeopardized by the counter-defendant's conduct and that Officer Schnurstein "destroyed the young man", - referring to the counter-plaintiff. We hold that all of those remarks in argument were improper, but, having been indulged in by counsel for both parties they are not so prejudicial as to require any reversal.

Another contention of the counter-plaintiff is that during the cross examination of Cornelia Henderson, she testified that she had instituted suit against Stephen Barzoo, the City of Cheaton and Mr. Schnurstein, and counsel for the counter-defendants then asked her if her claim was amicably disposed of. In objecting to this question the attorney for the counter-plaintiff in stating his grounds for the objection said: "The fact that Cheaton may have done something with this woman is irrelevant and immaterial." The court promptly commented that: "The interest of the party may be shown, but you have gone as far as you can go in showing the claim has

been disposed of." While we do not approve of bringing this matter to the attention of the jury, we believe, under the circumstances, including the way in which the counter-plaintiff's objection was stated, it is not reversible error.

There are other complaints of various evidentiary rulings made by the trial court. We have carefully reviewed these contentions and find them without substantial merit.

Lastly, the counter-plaintiff appellant complains concerning certain instructions given by the trial court. He urges that the element of contributory negligence was unduly emphasized in the instructions given at the instance of the counter-defendants. We believe, in reading the instructions, that the matter of the contributory negligence, if any, of the counter-plaintiff was alluded to only in conjunction with other elements in this case and its definition or effect was not overly emphasized. The instructions are given as one continuous series and the omission of the element of proximate cause in one instruction may be supplied by other instructions. The appellant also urges error in the giving of the counter-defendants' instruction No. 3, as follows:

"If you find from the evidence under the instructions of the court that at and just prior to the occurrence in question Stephen Barzso was operating his motor vehicle in a southerly direction on Route 53 near the intersection of said Route 53 with Route 64, and you further find that at such time the police vehicle being operated by Walter Schaurstein was proceeding in an easterly direction on Route 64, immediately approaching the intersection of Route 53 with Route 64, and was at such time giving audible signal by siren, and you further find that Stephen Barzso either heard or by the exercise of reasonable care should have heard the signal being given, then in such event you are instructed that it became and was the duty of Stephen Barzso to yield the right-of-way to the police vehicle being operated by Walter Schaurstein and to stop and remain clear of the intersection until such police vehicle had passed,

provided that in the exercise of reasonable care the said Stephen Barzso should have heard the said signal at a sufficient distance from the intersection to, in the exercise of reasonable care, bring his vehicle to a halt or otherwise yield the right-of-way."

No where do we find that the counterplaintiff ever urged at a conference on instructions that this instruction was erroneous because it contained this provision: " * * * provided that in the exercise of reasonable care the said Stephen Barzso should have heard the said signal at a sufficient distance from the intersection to, in the exercise of reasonable care, bring his vehicle to a halt or otherwise yield the right-of-way." In addition, we believe this instruction is proper in view of the evidence offered by the counter-plaintiff and the counter-defendants on the audibility of the sound of the siren.

A large number of witnesses testified in this case and there was a conflict in the testimony of some of them, as might be expected. The record is lengthy, and the abstract alone is 409 pages long. The jury found that the counterplaintiff and the counter-defendants were both guilty of negligence. They also found both not guilty of wilful and wanton misconduct. The jury were properly instructed concerning the rights of an emergency vehicle. An authorized emergency vehicle on an emergency run is entitled to precedence over all other vehicles provided that the statutory requirements relating to the proper warning of the approach of the emergency vehicle are satisfied. It was for the jury to determine from the testimony whether this particular siren was audible and gave adequate warning of its approach to the intersection. It is not for this Court to determine that as a matter of law the jury should have

found the counter-defendants guilty of wilful and wanton misconduct
or the counterplaintiff not guilty of contributory negligence.

We do not believe the verdict is against the manifest weight
of the evidence and it will therefore be affirmed.

A F F I R M E D .

Wright, J. Concur
Spivey, J. Concur.

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Abstract

General No. 11404

Abstract Only

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A.D. 1960.

FILED

FEB 23 1961

PAUL V. WUNDER
Clerk Appellate Court Second District

CHARLES JACOBS,

Plaintiff-Appellant,

vs.

DARREL C. HELMS and LILLIAN
FRANCES HELMS, his wife,

Defendants-Appellees.

Appeal from the

Circuit Court of

Lake County, Illinois

SPIVEY--J.

This is an appeal from a decree of the Circuit Court of Lake County dismissing plaintiff's complaint for want of equity. Plaintiff brought suit to rescind a contract for the purchase of real estate and to recover earnest money paid under the contract. A hearing on the merits resulted in a decree in defendants' favor which was entered on November 5, 1959.

Plaintiff contracted to purchase a tract of land and residence from the defendants for a total consideration of \$30,000.00. As earnest money, plaintiff paid \$5,000.00 down and the balance was due in \$200.00 monthly installments for five years with the unpaid balance remaining at the end of five years to be paid in full at that time. The property was

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purchased by the plaintiff through a real estate broker who had listed the property for the defendants. A description of the property was contained in the contract, but the description did not recite the dimensions of the premises. According to the purchase agreement, "the sellers agree to install plate glass windows in seven window openings in the basement and first floor of the residence on said premises, four of said plate glass windows to be installed in the basement and three plate glass windows to be installed on the first floor, all of said work to be completed on or before August 1, 1957."

A contract for deed executed by the parties provided:

"And in case of the failure of the Purchaser to make any of the payments, or any part thereof, or perform any of the covenants hereof on Purchaser's part hereby made and entered into, this contract shall, at the option of the Seller, be forfeited and determined, and the Purchaser shall forfeit all payments made on this contract, and such payments shall be retained by the said Seller in full satisfaction and as liquidated damages by Seller sustained, and in such event the Seller shall have the right to re-enter and take possession of the premises aforesaid."

On August 7, 1957, plaintiff, by his attorney wrote the defendants and advised the defendants that plaintiff had cancelled the agreement for failure of the defendants to install the plate glass windows in a workmanlike manner. Plaintiff also contended that he was informed that the property had a frontage width of 397 feet and that the actual width of the property as disclosed by survey was 229.46. Because of the alleged breaches, plaintiff demanded the return of the \$5,000.00 earnest money.

On August 1, 1957, Plaintiff's attorney wrote the defendants and advised the defendants to discontinue the agreement for failure of the defendants to install the plate windows in a workable time frame. Plaintiff also contended that he was informed that the property had a front width of 327 feet and that the actual width of the property was disclosed by survey was 329.45. Because of the alleged breaches, Plaintiff demanded the return of the \$5,000.00 earnest money.

After receipt of plaintiff's notice of cancellation, defendants notified the plaintiff on August 9, 1957 that by reason of the failure of the plaintiff to make payments as required by the contract, and for the failure of the plaintiff to paint the trim and gutters and pay the 1956 general tax, according to the contract, defendants elected to declare a forfeiture of the contract and retained the earnest money as liquidated damages. Defendants also requested the plaintiff to surrender the possession of the premises to the defendant.

Insofar as the defendants' contentions are concerned, it is not contradicted that plaintiff did not pay the 1956 taxes, paint the trim and gutters and make the August payment required by the contract. On the other hand, plaintiff contends that his own performance was excused by claimed material breaches of the contract by the defendants, which claimed breaches are:

1. Installation of the plate glass windows in violation of the Waukegan building code; and,
2. Failure to install the windows in a workmanlike manner.

Looking at the evidence, this court can only conclude that there was a conflict in the evidence as to the quality of the workmanship displayed in the installation of the windows. Unfortunately, the contract is no guide as to the manner of installation or the kind of windows to be installed. We have heretofore included in this opinion all reference to the defendants' duties with regard to the windows as defined by the contract and obviously the contract is inadequate to charge the defendants with a duty other than to install plate glass windows in a workmanlike manner.

On this issue, the trial court in its opinion said, "Strictly speaking, it is not necessary for the court in the view that it takes of the case to decide whether or not the

After a long and arduous search, the defendant has been located and is now in the custody of the authorities. The defendant is a male, of legal age, and is currently being held in a secure facility. The authorities are conducting a thorough investigation into the circumstances surrounding the defendant's activities. It is requested that you continue to provide any information that may be helpful to the ongoing investigation. The defendant's identity and the details of the case are being kept confidential to ensure the integrity of the legal process. Any further developments will be reported to you as soon as they are available. The authorities are committed to a fair and thorough investigation of this matter.

windows were installed in a workmanlike manner, nevertheless, the court does take notice of the fact that they were so installed and were not satisfactory or acceptable to and by the plaintiff. No doubt this will result in a monetary loss (damages) but * * * the remedy is not to rescind the contract."

The courts finding that the installation was done in a workmanlike manner is certainly not contrary to the manifest weight of the evidence and we cannot disturb the court's finding. Bremer v. Bremer, 411 Ill. 454, 104 N.E. 2d. 299; Black v. Gray, 411 Ill. 503, 104 N.E. 2d. 212; Smith v. Illinois Valley Ice Cream Co., 20 Ill. App. 2d. 312.

In the trial court, it was determined that plaintiff's remedy, if there was a failure to install the windows in a workmanlike manner, was an action for damages rather than rescision. However, regardless of the approach taken, the result would be the same since the trial court's finding that the work was done in a workmanlike manner is supported by credible evidence and not contrary to the manifest weight of the evidence. It would only serve to lengthen this opinion without corresponding benefit if we were to review the law of rescision or damages and finally conclude as we have that in either event, there was no error in the trial court's finding that defendants had not breached the contract in the manner of installing the windows. Neither remedy is available under these circumstances.

Plaintiff's argument that he is entitled to rescision because the windows were installed in violation of the Waukegan building code cannot be sustained. The trial court did not mention this point in his opinion but we conclude that there was a total failure to prove that the windows were installed in violation of the building code. The windows installed by the defendant were immovable and no provision was made in these

The court does take notice of the fact that they were so installed and have not satisfactory or reasonable to end by the plaintiff. No doubt this will result in a recovery loss.

(damages) but * * * the remedy is not to rescind the contract.

The courts finding that the installation was done in a workmanlike manner in carrying out according to the manifest weight of the evidence and we cannot disturb it on this point.

Brown v. Brown, 11 Ill. 2d 104, 105 N.E. 2d 678, 1953-1 C.M.A. 104.
41 Ill. 2d 104, 105 N.E. 2d 678, 1953-1 C.M.A. 104.

remedy is available under these circumstances.

correct in the manner of installing the windows. Neither the trial court's finding that defendants had not preceded the contents as we have that in other events, there was no error in

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contrary to the manifest weight of the evidence. It would only

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the same since the trial court's finding that the work was done

However, regardless of the evidence shown, the result would be

manifest manner, was an action for damages rather than rescission.

remedy, in there was a finding to install the windows in a work

I, the trial court, it has recommended that the plaintiff's

Plaintiff's argument that he is entitled to rescission because the windows were installed in violation of the Washington Building Code cannot be sustained. The trial court did not mention this point in his opinion but we conclude that there was a total failure to prove that the windows were installed in violation of the building code. The windows installed by the defendant were immovable and no provision was made in these

windows for ventilation. No evidence was offered as to the presence or absence of other provisions for ventilation. Further, the building inspector testified that the windows would be satisfactory if a mechanical method of ventilation was supplied. In the absence of evidence we have no way of knowing whether the parties contemplated mechanical ventilation or made other provisions for ventilation and so cannot state that the windows were installed in violation of the building code.

Plaintiff also contends that the frontage of the property was misrepresented and that he is entitled to rescission for this reason. We agree completely with the trial court on this point. The court, in a carefully prepared opinion, said:

"The court has read all the testimony on this point and the authorities cited by both parties on this question, and is fully informed as to what the contentions of the parties are.

"It is extremely difficult for the court, after considering the evidence and the authorities on the subject, to come to any such conclusion as was arrived at by the plaintiff. There is nothing in this record which will furnish any reasonable basis for the court to conclude that the defendants were selling or were representing that they were selling the plaintiff 397 feet along Sheridan Road.

"In the opinion of the court the overwhelming weight of the evidence on this point is in favor of the defendants. The plaintiff not only inspected the premises in question but the court believes that he was quite familiar with the property before he purchased it and had every opportunity to acquaint himself with the exact dimensions of the property. The difference between 397 feet frontage and 229.46 feet frontage along Sheridan Road in the City of Waukegan could become a very important item in the purchase or sale of real estate.

"Despite this obvious fact, the plaintiff did nothing to protect himself when the contract was written, or in any way guaranteeing directly or indirectly that he was purchasing 397 feet frontage. A simple statement to that effect in the contract would have been sufficient.

"Under the authorities cited by the defendants, Rotermund v. Lauritzen, 225 Ill. App. 170; Wadhams v. Swan, 109 Ill. App. 46; and Hunderford v. Behrends, 308 Ill. 406, the court is compelled to hold with the defendants on this particular issue."

The decree of the Circuit Court of Lake County is correct and is therefore affirmed.

Decree affirmed.

Crow, P. J., and Wright, J., concur.

"Despite this obvious fact, the plaintiff did nothing to protect himself when the contract was written, or in any way guaranteeing directly or indirectly that he was purchasing the best footage. A simple statement to that effect in the contract would have been sufficient.

"Under the authorities cited by the defendants, Robinson v. Robinson, 252 Ill. App. 170; Madame v. Swan, 103 Ill. App. 40; and Henderson v. Henderson, 108 Ill. App. 103 the court is compelled to rule with the defendants on this particular issue.

The decree of the Circuit Court of Lake County is correct and is therefore affirmed.

Decree affirmed.

Grove, P. J., and Wright, J., concur.

Agenda No. 212

PAUL V. WUNDER
First Appellate Court Second District

Appeal from the
County Court of
Kane County.

SECRET

The reply of the plaintiff denied that William H. Ruth had any authority to enter into any contract for the sale of the premises, denied

the making of any improvements thereon by the defendant and averred that no demand had ever been made upon plaintiff to perform any alleged contract executed by William H. Ruth. The issues made by the pleadings were submitted to the court for determination without the intervention of a jury and at the conclusion of the trial the court rendered judgment in favor of the plaintiff for the possession of the premises in question. To reverse this judgment defendant appeals.

The record discloses that the legal title to the premises involved in this proceeding was conveyed to plaintiff under trust agreement No. 20517, by a deed recorded on December 16, 1957; that on March 6, 1959, the bank, as trustee conveyed the premises to Thomas E. Woelfle, who on the same day conveyed to plaintiff as Trustee under trust No. 22379. The deed from the bank to Woelfle and the deed from Woelfle to the bank under trust agreement 22379 were both dated March 6, 1959 and both were recorded on July 31, 1959. Thereafter William Ruth, a building contractor and sub-division developer pursuant to an agreement with the beneficiary of the trust erected a model home on the premises involved in this proceeding. Ray Smith is a carpenter and building contractor and an employee of Ruth. On June 25, 1958 Smith received the keys to the house from Ruth who had been given permission by the beneficiary of the trust to allow Smith to stay in the home as long as he worked for Ruth or until he was told to leave.

John Demling is an attorney residing in Chicago and is the record holder of the beneficial interest in this trust by virtue of a conveyance recorded on July 31, 1955 and he testified that he holds this interest for his client, Scarlet Glow Engineering Company. The defendant Ray W. Smith testified that the premises involved in this proceeding is designated as No. 1824 Edgelawn Court, Aurora, Illinois; that the lot in

question is located in Fordon Park Subdivision and is improved by a four bedroom, two bath, brick front and frame construction dwelling house; that William Ruth developed this subdivison and that he, Smith, had a carpenter labor contract with Mr. Ruth; that Ruth was selling houses in this area and between the first and fifteenth of May 1958 Ruth and Smith had a conversation at Ruth's office in which Ruth told him that he, Ruth was the owner of the property and offered to sell Smith the property involved in this proceeding for \$19,200.00; that Ruth told him, (Smith) that he could not give him a clear title but if he (Smith) would make an application for a mortgage and get it approved that he would be able then to provide him with a clear title. Mr. Smith further testified that he had a contract with Ruth to do the carpenter work on several of the houses in this sub-division; that he knew Ruth had sold several of those houses and that he had no reason to doubt that Mr. Ruth was the owner of the property.

The record also discloses that an application to the Advance Mortgage Corporation of Chicago for a loan on this property was submitted and in connection therewith the mortgage corporation wrote Mr. Smith on April 2, 1959 that it was prepared to draw the mortgage loan documents but requested that Smith forward to it the owner's title policy. Mr. Smith testified that he ~~wasn't~~ showed this letter to Mr. Ruth and that Mr. Ruth told him he would procure the title policy but never did. Mr. Smith further testified that he had been fully paid for all the work he did on the house located on the premises in question either by Mr. Ruth's personal checks or by order on the Improvement Savings & Loan Association issued at Mr. Ruth's direction.

On cross-examination Mr. Smith testified that he was familiar with the practice of selling houses and the seller then procuring title in order to convey; that Ruth told him that he couldn't give him a clear title because there were liens against the property; that the reason he had paid

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no one any money as rent or anything in return for his occupancy of the property since June 25, 1958 was because, he, Smith was purchasing the property under a contract. He further testified that he never did anything to consummate the purchase except make an application for a loan; that he never paid any taxes on the property and never made any title examination to determine where the title was vested but relied upon the statement of Ruth who told him he was the owner of the whole sub-division.

The record discloses that on March 27, 1958 plaintiff, as trustee, executed its note for \$16,600.00 due on or before April 1, 1959 with 6% interest, interest payable semi-annually. This note was payable to Improvement Savings and Loan Association and its payment secured by a mortgage upon the premises involved in this proceeding. Another note for the same amount payable to the same Loan Association and dated April 2, 1958, executed by William H. Ruth was admitted in evidence over plaintiff's objection as to its relevancy and materiality. It also appears that several claims for mechanic's liens have been filed against this property by various parties.

Counsel for appellant insists that the evidence found in this record discloses that appellee knowingly and deliberately allowed William H. Ruth to represent himself to defendant as the owner of this property; that defendant, believing that Ruth was the owner, entered into a verbal contract with him by the provisions of which Ruth agreed to sell this property for \$19,200.00 and defendant agreed to purchase the same; that Ruth had the keys to this property and he delivered them to defendant with the knowledge of plaintiff and plaintiff, therefore, is estopped, in this proceeding, from denying Ruth's ownership.

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What the record discloses, however, is that Ruth was a building contractor and a sub-division developer and defendant was his employee. Defendant went into possession of this property with the consent of the holder of the legal title and the holder of the beneficial interest in the trust of which plaintiff was trustee. The permission given Ruth, according to the evidence was for him to permit defendant to occupy the house so long as he worked for Ruth or until he was told to get out. The conversations between Smith and Ruth, as testified to by Smith were heard by the trial court subject to the objection of plaintiff's counsel. Upon this record they were incompetent and so treated by the trial court. Mr. Ruth was not produced as a witness and the record does not account for his absence. Ruth was not the owner of this property and the evidence disclosed that he was in no sense the agent of the plaintiff or agent of the owner of the beneficial interest in the trust of which plaintiff is trustee. It was the owner of this beneficial interest who permitted the construction of this home upon the lot in question by Ruth and there is no merit in appellant's contention that the evidence does not disclose plaintiff's possession or its right to possession of this property at the time this proceeding was instituted. The evidence discloses that the owner of the beneficial interest in this trust purchased, in December 1957, this lot along with nineteen other lots in this sub-division. The owner of the beneficial interest in this trust did have some arrangement with Ruth for the purchase of these twenty lots but that arrangement was terminated in May, 1958.

Counsel for appellant further insists that this action cannot be maintained because no demand for possession was made by plaintiff prior to filing the complaint in this case. Counsel argue that the evidence

justified a revision from 1.5 to 2.0, resulting in 1.000 and 0.000.

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The following information was obtained from the records of the Bureau of
Prisons and Penitentiaries, State of New York, dated July 1, 1908.

discloses that defendant obtained possession of the premises in controversy under a verbal agreement to purchase and under the fifth clause of section 2 of the Forcible Entry and Detainer Act demand for possession by the party entitled to possession before suit was instituted was a prerequisite. (Ill. Rev. St. 1959, Chap. 57, sec. 2.) This argument assumes that the evidence discloses that defendant was in possession by the provisions of a valid verbal agreement to purchase. What the record shows is that if defendant had any purchase agreement of any kind it was with someone who had no title to convey. The record does show that defendant did go into peaceable possession of the premises and at the time the suit was begun, unlawfully withheld possession from the party entitled to possession. The second clause of section 2 of the Forcible Entry and Detainer Act therefore applies and no previous demand was required. In *Loekest v. Stoltz*, 323 Ill. App. 164, 166, it is said that demand in writing, before suing, is required only under clauses 5 and 6 of section 2 of the Forcible Entry and Detainer Act.

The evidence found in this record sustains the judgment of the county court of Kane County and that judgment is affirmed.

Judgement affirmed.

SMITH, P.J. CONCURS.

McNEAL J. CONCURS.

Agenda No. 11

FEB 23 1951

PAUL V. WUNDER
Clark Appellate Court Second District

Plaintiff, Commercial Products Corporation, brought this action in the Circuit Court of Winnebago County against the defendants, Solem Machine Company, a corporation, and Peter A. Solem, to recover a broker's commission alleged to be due to it from the defendants for obtaining for the defendants an industrial loan in the amount of \$225,000.00. The case was tried before the Court, and at the conclusion of the trial the Court rendered judgment in favor of the plaintiff and against the defendant, Solem Machine Company, for \$4,500.00 and costs of suit. Judgment was also rendered in favor of Peter A. Solem, the individual defendant, and against the plaintiff in bar of its action against this defendant. To reverse this judgment the Solem Machine Company, hereinafter referred to as the defendant company, appeals.

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It is the theory of the plaintiff that the defendant company, acting through its president, Peter A. Solem, employed plaintiff Commercial Products Corporation, to obtain for the defendant company, a commercial loan and that the plaintiff, through its president and agent, Conrad G. Dyke, did obtain the desired loan and that a commission was, therefore, due and payable to plaintiff. It is the contention of the defendant that the evidence discloses that the plaintiff was not the procuring cause of the loan which defendant company obtained and therefore was not entitled to any commission.

In its complaint the plaintiff alleged that it was a corporation and that it was in the business of obtaining financing for manufacturing companies that desired to expand their facilities; that Conrad G. Dyke was in July, 1958, the president of plaintiff; that in the early part of that month Conrad G. Dyke went to the office of defendant company in Rockford, Illinois, and solicited the business of obtaining financing for the needs of defendant company; that Solem informed Dyke that defendant company intended to construct a new building for manufacturing purposes and in order to do so needed to borrow money and he there employed plaintiff to obtain the necessary financing; that pursuant to such employment, Dyke went to the Illinois National Bank & Trust Company of Rockford, Illinois, and obtained a commitment from it to loan defendant company a sum of money in accordance with the terms of a certain letter dated September 12, 1958, signed by Peter A. Solem and executed by him and delivered to Dyke that day. Attached to the complaint and made a part thereof was a copy of this letter which is as follows:

Solem Machine Company
Rockford, Illinois

September 12, 1958

"Commercial Products Corporation
Princeton, Illinois

Gentlemen:

It is the theory of the plaintiff that the defendant company, acting through its president, Peter A. Cohen, employed plaintiff Commercial Products Corporation, to obtain for the defendant company, a commercial loan and that the plaintiff, through its president and agent, Conrad C. Dyke, did obtain the desired loan and that a commission was, therefore, due and payable to plaintiff. It is the contention of the defendant that the evidence discloses that plaintiff was not a procuring cause of the loan which defendant company obtained and therefore was not entitled to any commission.

In its complaint the plaintiff alleged that it was a corporation and that it was in the business of obtaining financing for manufacturing companies that desired to expand their facilities; that Conrad C. Dyke was in July, 1935, the president of plaintiff; that in the early part of that month Conrad C. Dyke went to the office of defendant company, Rockford, Illinois, and solicited the business of obtaining five and one-half per cent of defendant company, that defendant company intended to construct a new building for manufacturing purposes and in order to do so needed to borrow money and he then suggested plaintiff to obtain the necessary financing; that pursuant to such suggestion, Dyke went to the Illinois National Bank & Trust Company of Rockford, Illinois, and obtained a commitment from it to loan defendant company a sum of money in accordance with the terms of a certain letter dated September 12, 1935, signed by Peter A. Cohen and executed by him and delivered to Dyke that day. Attached to the complaint and made a part thereof was a copy of this letter which is as follows:

Solex Machine Company
Rockford, Illinois
September 12, 1935

"Commercial Products Corporation"
Winchester, Illinois
Gentlemen:

Attention: Mr. Conrad G. Dyke
Account Executive

This letter will confirm my understanding regarding the Two Hundred Fifty Thousand (\$250,000.00) Dollar first mortgage loan.

I am willing to give a first mortgage with an interest rate of five and one-half per cent (5 1/2%) and a pre-payment plan of Three Thousand Dollars (\$3,000.00) per month for the sixty month period. The balance at the end of the five year period will be paid in full. I also wish to have the privilege of paying off the entire loan at any time during the five year period.

Yours very truly,
Peter A. Solem

The complaint then alleged that the usual and ordinary rate of commission for the services of procuring a loan of the nature described in the complaint in the Rockford Community where the loan was made, was two per cent of the amount of the loan obtained and concluded by praying for judgment. The answer of the defendants denied all of the allegations of the complaint.

At the hearing Conrad G. Dyke testified that he was the owner and president of Commercial Products Corporation and engaged in industrial financing; that he first talked with Peter A. Solem sometime during the summer of 1958 at his office in Rockford; that he asked Mr. Solem if he had need of industrial financing, and Mr. Solem told him that he would be interested in obtaining a loan for about \$300,000.00 and that he could give as collateral a first mortgage for five years and Dyke said he would see what he could do. After this conference Dyke testified that he went to Chicago where he had a number of contacts among banks, insurance companies and friends engaged in industrial financing and talked to several of these institutions relative to the making of a loan to the defendant company. He stated that when he found it was impossible to get a loan from an insurance company, he called on a number of banks, one of these being

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This is a very old document, and the handwriting is very faded. The text is written in a cursive script, and the ink is very light. The document appears to be a letter or a memorandum, and it is dated 1864. The text is written in English, and it is very difficult to read. The document is very old, and it is in very poor condition. The text is written in a cursive script, and the ink is very light. The document appears to be a letter or a memorandum, and it is dated 1864. The text is written in English, and it is very difficult to read.

[illegible]

the City National Bank of Chicago of which Donald Baer was an executive officer. This bank was interested in making a loan to the defendant company, but Mr. Baer wanted to know more about the company before making any commitment, and Dyke then talked to Mr. Miller, a vice-president of City National Bank who talked to a Mr. Abegg, an executive officer of the Illinois National Bank and Trust Company located at Rockford, Illinois. Following this telephone conversation Mr. Dyke went to Rockford and saw Mr. Abegg relative to a loan to the defendant company for \$250,000.00 and obtained from him a commitment for a loan to defendant in that amount on the basis that the company would secure it by a mortgage on its plant and equipment and repay the same at the rate of \$3,000.00 a month for five years with the balance being paid at the end of the fifth year at 5 1/2 per cent interest. After Abegg had made this commitment to Dyke, Mr. Dyke proceeded to Solem's office and outlined the plan to him; that they spent thirty minutes discussing the matter and during the conversation Mr. Solem said to Mr. Dyke, "All right. You dictate a letter to my stenographer". Mr. Dyke did so ^{and} Mr. Solem signed and delivered it to Mr. Dyke and this is the letter of September 12, 1958, herein before referred to, which, upon the hearing, was offered and admitted in evidence without objection.

Dyke also testified that Solem told him in this conversation that he had been trying to get a loan from the Illinois National Bank & Trust Company where he had done business for a number of years, but that this bank had turned him down. Mr. Dyke further testified that when he talked to Abegg of the Illinois National Bank & Trust Company, Mr. Abegg never told him that he and Solem ~~now~~ ^{of} had discussed the making/a loan such as Solem now wanted. Dyke further testified that after leaving Solem's office on the afternoon of September 12, 1958 he called Mr. Abegg and

advised him that Mr. Solem had agreed to accept the offer of Abegg to make the loan.

Mr. Dyke further testified that a couple of weeks later he sent Solem a statement requesting payment of his commission and receiving no reply, he then came to Rockford from his home in Princeton and called Mr. Solem who told him that he, Solem, was not going to make the loan and refused to pay him any commission. In this conversation Dyke testified that he told Mr. Solem that whether or not he made the loan had no effect on his commission; that he, Solem, had given him a letter of commitment and instructions and said he would accept a loan on that basis and that he (Dyke) had completed his part of the contract when he got the bank to agree to make the loan to Solem's company on the basis of the terms desired by Solem.

Mr. Dyke also testified that the usual and ordinary commissions that are paid in the Rockford Community for agents to procure industrial loans of the type about which he testified vary from two per cent to five per cent, and that it was his opinion that the ordinary, customary and usual commission which would be paid where a loan of the type here in question was made and under the circumstances shown here would be two per cent.

Two witnesses testified on behalf of the defendant company. These were Roger Sheets, vice-president of defendant, and Eugene Abegg, the president of the Illinois National Bank & Trust Company, and the bank where plaintiff insists he obtained the commitment to make the loan to defendant company. Peter A. Solem, the president of defendant company, did not testify. Apparently he was ill at the time of the hearing.

Sheets' testimony was to the effect that he and Mr. Solem had conferred with Abegg regarding financing for the construction of the defendant

THE UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: [Name]

SUBJECT: [Subject]

1. [Text]

2. [Text]

3. [Text]

4. [Text]

5. [Text]

Very truly yours,

[Signature]

[Name]

[Title]

[Text]

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company's new plant prior to the time that plaintiff, through its president, Dyke, entered into the picture and that Abegg had informed them that it was willing to make a mortgage loan of \$250,000.00 with the new plant and equipment as security, which loan was to be paid in monthly installments over a five year period. Sheets further testified that in November of 1958, defendant company did execute a note to Illinois National Bank & Trust Co. in the amount of \$225,000.00, payable \$3000.00 a month, at the rate of 5 $\frac{1}{4}$ % interest, with the balance of the loan being due in five years and secured the payment of the same by a trust deed on defendant company's plant. He stated that the terms of this note and trust deed were the same terms upon which this bank and the defendant company had been negotiating prior to the time Mr. Dyke had talked to Mr. Abegg at the bank, and he further stated that the bank had remained willing to negotiate such a loan with defendant company since the first conference early in 1958.

Eugene Abegg testified that he was president of the Illinois National Bank & Trust Company and in his testimony referred to his conversation with Mr. Dyke on September 12, 1958, the date of the letter. He stated that on this date they talked about the possibility of City National Bank & Trust Company of Chicago making a loan to Selen Machine Company for \$250,000.00 at 5 $\frac{1}{4}$ per cent interest for five years, with a prepayment privilege but no required prepayments. Abegg testified that his bank would not make that type of loan, but that his bank had previously told defendant company just what kind of a loan it would make and that it would lend it \$250,000.00 with monthly payments of at least \$3,000.00 but that his bank was not interested in participating with the City National Bank of Chicago in making such a loan, and that his bank would make the loan itself if such a loan was made to defendant company.

It appears from the evidence that Solem, as an individual, and the defendant company had for a number of years been doing business with the Illinois National Bank & Trust Company of Rockford, and that in the early part of 1958 the defendant company desired to negotiate a substantial loan, without security, which the bank refused but did indicate that it would finance about one-half the cost of a new plant securing the same by a mortgage on the new plant and equipment provided the defendant company would pay it out over a five year period.

It is settled law that if a broker procures a customer who is ready, willing and able to make a loan according to the terms desired by the principal, the broker is entitled to a commission. (Wilson vs. Mason, 158 Ill. 304; Camp vs. Hallis, 332 Ill. App. 60; 5 Ill. Law and Practice, Brokers, Sec. 78). It is equally well established that a broker who has procured such a customer for his principal cannot be deprived of his commission simply because the principal completes the transaction himself. (Day vs. Porter, 161 Ill. 235.)

Here the evidence clearly shows that Dyke on behalf of the plaintiff company talked to a number of insurance companies and banks in Chicago concerning the making of a loan to defendant company. At the City National Bank in Chicago one of the banks contacted by Dyke, he talked with a Mr. Miller, who referred him to its correspondent bank in Rockford, Illinois National Bank & Trust Company, and advised him to talk to Mr. Abegg, the President of the Rockford Bank. This, the evidence shows, Dyke did and Mr. Abegg indicated to Dyke that his bank would make the loan. After this conversation Dyke went to the office of the defendant company and reported to Solem what had happened and Mr. Solem requested Dyke to dictate the terms of the proposed loan and he did so in Solem's office and Solem signed this instrument and delivered it to Dyke. Mr. Dyke testified that Solem had told

Prilov v. Oshkowsky, 115 Ill. App. 165:

him previously that the Illinois National Bank & Trust Company had
refused to make him the loan and this was not refuted. The letter of / September 12, 1958 as
the trial court stated, gave Dyke authority to procure the loan anywhere
and when he obtained a loan for defendant company in accordance therewith
the commission had been earned. It is conceded that the Rockford bank
made to defendant company on November 1, 1958 a \$225,000.00 ^{loan} upon the very
terms as set forth in Solan's letter of September 12, 1958.

We do not agree with the assertion of the defendant company that
there is no competent testimony in the record to support the two per cent
rate of commission allowed to the plaintiff by the Court for obtaining the
loan. Dyke testified on this point and his testimony, not being contradicted
in any respect, was sufficient to establish that the amount allowed by the
Court was proper.

The judgment entered by the Circuit Court of Winnebago County
is affirmed.

Judgment Affirmed.

SMITH, P.J. and McNEAL, J. Concur

September 12, 1958
to

from

WILLIAM L. BROWN

Abstract

General No. 11446

(Abstract Only)

FILED

IN THE

APPELLATE COURT OF ILLINOIS

PAUL V. WUNDER
Clerk Appellate Court Second District

SECOND DISTRICT

SECOND DIVISION

OCTOBER TERM, A.D. 1960

DONNELL HYDRAULIC COMPANY,
a corporation,

Plaintiff-Appellee,

vs.

FLORENCE STANDISH, d/b/a
C. B. R. Motor Forwarding,

Defendant-Appellant.

Appeal from the

Circuit Court of

McHenry County

SPIVEY--J.

SECRET

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SECRET

A jury in the Circuit Court of McHenry County returned a verdict in the amount of \$2,250.00 in favor of the plaintiff, Donnell Hydraulic Company, a Corporation, and against the defendant, Florence Standish, d/b/a C. B. R. Motor Forwarding for failure to collect on delivery for certain goods transported by her. The Pennsylvania Railroad, also a defendant, was found not guilty. Standish has appealed from the judgment against her on the verdict.

Briefly stated, the evidence shows that Donnell Hydraulic Company (hereafter called Donnell) manufactured jacks which were sold to a company in Pittsburgh, Pennsylvania. The jacks were delivered to Standish under bills of lading, prepared by Donnell, requiring the carrier to collect on delivery. Standish, an interstate carrier, carried the jacks to Chicago, but because of a truck strike in the East, was unable to interline with an interstate carrier for delivery in Pittsburgh. Standish then returned the jacks to its terminal and advised Donnell of the situation. By telephone conversation, Standish agreed to deliver the jacks to the Pennsylvania Railroad in Chicago, so that the railroad could make the delivery in Pittsburgh. There is a conflict in the evidence as to which party contacted the railroad. Each party claims that the arrangements with the railroad were made by the other. However, it is not disputed that Standish prepared new bills of lading on the shipments and delivered the bills and the goods to the Pennsylvania Railroad. The new bills of lading prepared by Standish did not require collection on delivery. When the goods were delivered to the consignee, the railroad did not collect for the goods and Donnell contends it has never been paid for these shipments.

Standish contends she was not asked to collect from the consignee and further contends that Donnell has been paid by the

consignee. The consignee testified that his records, did not indicate any balance due to Donnell. Donnell's agent on cross examination testified that the consignee's account balance of \$2,583.73 was reduced to \$2,250.23 by a credit given the consignee for merchandise returned.

In this appeal, Standish contends that the verdict was contrary to the law and the evidence, that plaintiff is estopped to assert any claim against her because of payments received by the plaintiff, and that the court erred in giving and refusing instructions.

Defendant's contention that the verdict is contrary to the law and evidence is based upon the size of the verdict. The complaint alleges a duty on the part of the defendant to collect on delivery the sum of \$2,583.73 and the jury's verdict was in the amount of \$2,250.00. According to plaintiff's evidence as disclosed on cross examination, the balance of plaintiff's open account with the consignee at the time of this suit was \$2,250.23, and so, defendant claims that the verdict of the jury was on the open account and not according to the case of failure to collect on delivery as pleaded in plaintiff's complaint. This, contends the defendant, is a fatal variance in the complaint and verdict which vitiates the verdict.

By its evidence and by cross examination the defendant attempted to make a defense of payment. In some measure, at least, the defense of payment was accepted by the jury and the claim of the plaintiff has been partially reduced. The action of the jury is consistent with the evidence and is not indicative of a compromise or an abandonment of that degree of care and attention to its judicial function that a litigant is entitled to receive. Plaintiff's claim has been met with a partial defense but no

complaint is made by the plaintiff. Under these facts, the defendant cannot be heard to complain that the verdict against him was too small. DuQuoin Packing Co. v. Bonifield, 330 Ill. App. 338, 343, 71 N.E. 2d. 173; Palmer v. Gillarde, 312 Ill. App. 230, 242, 38 N.E. 2d. 352; Wright v. Stinger, 269 Ill. App. 224, 42 N.E. 2d. 323; People's National Bank of Monmouth v. Fernald, 252 Ill. App. 5, 13 N. E. 2d. 1023. See also 174 A.L.R. 799 n.

The contention that plaintiff is estopped from asserting any claim against the defendant because of payment by the consignee is not substantiated by the evidence. Defendant contends that the evidence of payment is uncontradicted but this contention is in error. Donnell's agent testified that Donnell had never been paid for the shipments in question. We cannot say that the jury's rejection of this defense was in error.

Finally, it is urged that the trial court erred in instructing the jury. At plaintiff's request, the court gave the following instruction:

"You are instructed that if, from a preponderance of the evidence, you believe that Defendants, or either of them, undertook to ship Plaintiff's goods C.O.D., the Defendants, or either of them, were bound to collect the amount due and remit to the plaintiff within a reasonable time, or if payment was refused at destination, to return the goods to Plaintiff."

At the instruction conference plaintiff objected to the instruction, contending that it was peremptory and failed to include the issue of payment. Plaintiff contends that the instruction is not peremptory and urges that all instructions when considered together as one connected series informed the jury fully as to the issue of payment.

On behalf of one of the defendants, the court gave the following instruction:

"If you find from all the evidence that the consignee, the Scaffold Equipment Company, paid for all the jacks, then you must find there is no sum due and owing the plaintiff and it cannot recover from the defendants."

Defendant cites three cases in support of her position. We believe there is a substantial difference between the cases cited and the instant case. In Hanson v. Trust Co. of Chicago, 380 Ill. 194, 197, 43 N.E. 2d. 931; and Peters v. Madigan, 206 Ill. App. 417, the instructions objected to are what we would describe as the "pure" peremptory instruction. That is, they conclude with the "classic language" "you should find the defendant not guilty," or "you should find for the plaintiff", and in each case, the giving of this type of instruction, omitting a necessary essential element to warrant recovery was held to be reversible error. The instruction in the instant case is not of the "pure" type.

Defendants also cite Pardridge v. Cutler, 168 Ill. 504, 48 N.E. 125. In that case the instruction informed the jury that "the plaintiff has a right to recover from the defendants all such moneys so paid out." There is very little difference between this language and language directing the jury to find for one or the other of the parties.

In the instant case the jury is informed that the defendants were bound to collect the amount due and remit to the plaintiff. The language stops short of directing the jury to find for the plaintiff or declaring plaintiff's right to recover against the defendant, for failure of the defendant to collect on delivery and remit. It is true that an instruction may be peremptory without the so-called "classic language" but we conclude that this instruction is not peremptory.

Plaintiff sought \$2,583.73 in its complaint but on cross-examination admitted crediting the consignee's account for \$333.50, for merchandise returned. The jury's verdict was in the amount of \$2,250.00. Obviously, consideration was given to the defense of payment and plaintiff's award was reduced by the credit given the consignee. With the record showing affirmatively that the jury was not misled by the instruction, and that the jury gave consideration to the defense of payment, we hold that the giving of the instruction was not reversible error. "The trend of judicial opinion reveals a reluctance to reverse cases on the ground of technical errors in instructions; hence, courts have reiterated that the instructions will be considered as a whole, and where the jury has not been misled, and the complaining party's rights have not been prejudiced by minor irregularities, such errors will not be deemed grounds for reversal." Duffy v. Cortesi, 2 Ill. 2d. 511, 515, 119 N.E. 2d. 241.

In commenting on the Duffy v. Cortesi case, the Appellate Court for the First District said, "We think the court implied that an erroneous peremptory instruction need not require reversal if the record affirmatively shows the error was not prejudicial and could not have misled the jury." Latsis v. Walsh, 28 Ill. App. 2d. 91, 94, 170 N.E. 2d. 633.

Based on the foregoing authority, whether or not the instruction was peremptory, it was not reversible error to give the instructions over an objection that it was peremptory and failed to include all the elements essential to recovery.

Defendant Standish also complains of the failure of the court to give an instruction which informed the jury that if she was employed only to haul the two shipments to Chicago and she

performed this service and if there was no obligation of her part to collect for the shipments, then the plaintiff could not collect from the defendant Standish. This certainly is the "pure" peremptory instruction and ignores entirely the contention that Standish unquestionably did undertake to prepare and did prepare the bill of lading. If her duty was to draw a C.O.D. bill of lading and she failed in this duty, then she would still be responsible to the plaintiff. The refusal of the defendant's instruction was not error.

The judgment of the Circuit Court of McHenry County is affirmed.

Judgment affirmed.

Crow, P. J., and Wright, J., concur.

General No. 11475

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
February Term, A.D. 1961

FILED

PAUL V. WUNDER
Clark Appellate Court Second District

JERRY ROWLAND, a Minor, by his
Mother and Next Friend, LORRAINE
ROWLAND,
Plaintiff-Appellant,

vs.

WILHELM T. PALM,
Defendant-Appellee.

Appeal from the
Circuit Court of
Winnebago County.

DOVE, U.

At about 4:15 o'clock of the afternoon of July 1, 1958 Jerry Rowland, 15 years of age was driving a motorcycle in a southerly direction on North Second Street, also known as Route 51, north of Loves Park, Illinois. North second street is a divided four lane highway, the north and south bound traffic lanes being separated by an island or parkway. Coronado Boulevard is a paved street running in an easterly and westerly direction and intersects North Second Street at a right angle.

At the time Jerry Rowland was approaching the intersection of North Second Street and Coronado Boulevard, William T. Palm was operating his one and one-half ton truck in a northerly direction on said North Second Street. As he approached the Coronado Boulevard intersection he turned his directional signal lights indicating that he intended to

make a left turn across the parkway and into Coronado Boulevard. He stopped his truck in the parkway and then proceeded in low gear across the intersection in a westerly direction. When the front wheels of his truck had reached the west side of the pavement the motorcycle driven by Jerry Rowland struck the right side of the Palm truck cab and, as a result of the collision, Jerry Rowland was thrown off his motorcycle and injured. To recover for these injuries and the damage to his motorcycle Jerry Rowland filed, on March 10, 1959, the instant complaint.

The complaint alleged that at and before the time of the collision plaintiff was in the exercise of due care for the safety of his person and property and charged that the defendant was negligent in making an improper left turn; that he failed to keep his truck under control; that he failed to maintain a proper lookout and that he failed to yield the right of way. The answer of the defendant denied all charges of negligence and the allegations of due care. The issues made by the pleadings were submitted to a jury resulting in a verdict and judgment in favor of the defendant. To reverse this judgment plaintiff appeals.

The record discloses that the day was clear and at the place of the occurrence the highway was straight and level and the pavement dry. The defendant testified that after he made the left-hand turn from Route 51 into the parkway he stopped his truck eight or ten feet west of the east edge of the pavement and remained stopped for a minute or two waiting for the south bound traffic to clear; that two or three cars passed him going south while he was stopped; that he observed

the Kleinsmith truck approaching the intersection from the north at the rate of twenty to twenty-five miles per hour when it was three-quarters of a block north of the intersection; that he did not see the plaintiff or his motorcycle but proceeded slowly into the intersection and the front wheels of his truck had reached the west edge of the pavement when his truck was struck on the right side of the cab by the motorcycle driven by the plaintiff.

Ernest Kleinsmith testified at the instance of the plaintiff to the effect that he was proceeding south on the inside lane of the highway in his truck at the time in question and intended to make a left-hand turn and enter Coronado Boulevard and proceed east; that he first saw defendant's truck when he, Kleinsmith, was about three-quarters of a block north of the intersection; that the Palm truck stopped at the intersection for a couple of seconds and that it then proceeded west; that he, Kleinsmith, was in his proper lane of traffic to make a left turn and observed that behind his truck and in the outer traffic lane was the motorcycle driven by the plaintiff proceeding south at about 25 miles per hour; that the motorcycle passed him 100 or 150 feet north of the Coronado Boulevard intersection; that he reduced the speed of his truck and the driver of the motorcycle went a little faster and hit the truck, at which time Kleinsmith had almost stopped his truck in order to turn east.

Lawrence Bradenbeck also testified at the instance of the plaintiff to the effect that he was driving a panel truck and entered Route 51 on the afternoon in question; that he was travelling between 30 and 35 miles per hour and had proceeded

in a southerly direction about two blocks when the motorcycle driven by the plaintiff passed him and proceeded south between "thirty to fifty, maybe sixty feet" in front of the truck Bradenbeck was driving; that he, Bradenbeck, observed that as the motorcycle approached the Coronado Boulevard intersection the driver, as he expressed it, "slammed into the back of the front wheel of the truck." This witness further testified that he first saw the truck of the defendant as it came across the pavement and at that time it was travelling about 15 miles per hour and he, Bradenbeck, was thirty to fifty feet north of the intersection. Upon cross-examination this witness admitted that some twenty days after the occurrence he stated that the first time he saw defendant's truck was at the time the motorcycle ran into it.

The plaintiff testified that at the time of the accident he was fifteen years of age; that the motorcycle he was driving was new, having been purchased two and one-half weeks before the occurrence in question, and its horsepower was 4.9; that the afternoon of July 1, 1958, was clear and as he was driving south on Highway 51 in the outer lane the pavement was straight and level and that he could see for one and one-half miles to the south as he approached the Coronado Boulevard intersection. In response to his counsel's question as to whether he was driving in the south-bound lane of Highway 51, the defendant answered: "Yes. I was just going down the road on the outside lane and all I seen, I seen something in front of me and I tried to stop but it was so quick; something shot out in front of me and the next thing I knew I woke up in a hospital. I was going between twenty-five and thirty miles an hour." Upon cross-examination the plaintiff testified that

he did not notice the Kleinsmith car or recall that he passed it and stated that he didn't have time to apply his brakes, sound his horn or turn his wheel either to the right or left before the collision.

Appellant insists that he was deprived of a fair trial because counsel for defendant, in referring to plaintiff's operation of the motorcycle prior to the collision, used the terms "shot ahead" and "shot past". It is argued that by the use of these terms by counsel for defendant, plaintiff was portrayed in an unfavorable light as an irresponsible and reckless motor-bike driver.

The record discloses that in the cross examination of Mr. Kleinsmith, after he had testified that plaintiff passed him and proceeded south, this witness was asked: "As a matter of fact, he continued right down the highway and ran into the truck, didn't he?" and the witness answered: "That is right". Counsel then asked this question: "As a matter of fact, when you slackened up your speed the motorcycle just shot ahead, didn't it?" There was no objection and the witness answered: "That is right." A little later in the cross-examination of this witness, he was asked "How, did you see the motorcycle operator, as you have testified, when he shot past you on the right lane on the motorcycle?" There was no objection by counsel and the witness answered in the affirmative. A little later in his cross-examination this witness was asked: "What portion of his body (referring to the plaintiff) did you see as he shot by?" The witness answered: "I seen the top of his head". Counsel for plaintiff then said: "I object to his using the word 'shot' so many times". The court sustained the objection and stated: "You are using the word 'shot' too much". These are the only times

[illegible]

counsel used the words complained of and when an objection to their use was made the objection was promptly sustained. There is no merit in this contention and, furthermore, the plaintiff, himself, in referring to the defendant's truck, stated that he did not see it "until it just shot out in front of me." We have examined the three cases cited by counsel, but none of them have any application to the situation disclosed by this record.

It is next insisted that the trial court erred in giving, at the request of the defendant, the following instruction to the jury: "The court instructs the jury that if you believe from the evidence that plaintiff, on the occasion in question, drove his motorcycle against the side of defendant's truck and that in doing so, if you so believe he was guilty of negligence proximately contributing to the accident, then you should find the defendant not guilty." Counsel states that this instruction is so phrased that the jury can find the plaintiff guilty of contributory negligence, merely because there was a collision; that there are several reasons why the jury could have excused the plaintiff for driving into the truck of the defendant, such as "being unable to stop, etc."

This instruction states the law and when considered in the light of the evidence found in this record, it was not error to give it. Furthermore, an almost identical instruction was tendered in *Bayer v. St. Louis, Springfield and Peoria Railroad Co.*, 188 Ill. App. 323, which the trial court refused to give. The appellate court in that case held that its refusal necessitated a reversal of the judgment of the lower court.

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The foregoing are the only errors relied upon by appellant for the reversal of this judgment. We have read the record, examined the instructions and in our opinion the finding of the jury is supported by the evidence. There is no reversible error found in this record and the judgment of the trial court, upon such a verdict, should be affirmed.

Judgment Affirmed.

SMITH, P.J. CONCURS

McNEAL, J. CONCURS

The foregoing are the only errors which appear upon my
examination of the report of this subject. He has read the
report, examined the instructions and in my opinion the
writing of the report is correct. There is
no material error in the second and third parts of
the report, and the report is correct in all respects.

Very truly,
Your obedient servant,

W. L. G. G. G.

W. L. G. G. G.

29 #1

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

2710

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

An action was brought in the Circuit Court of Cook County by Pauline Kotowski (hereinafter referred to as the plaintiff) against Luther Cook, individually and doing business as Cook Construction Company (hereinafter referred to as Cook), and Mary Witanowski and Telesfor Witanowski (hereinafter referred to as the Witanowskis) to recover damages caused by the alleged negligence of the defendants in maintaining and repairing a common stairway in the rear of the building where the plaintiff resided. The jury rendered a verdict for the defendants. The plaintiff filed a post-trial motion asking for a new trial, which motion was denied by the court. The court entered judgment on the verdict, from which judgment the plaintiff takes this appeal.

The plaintiff urges as error that the verdict is against the manifest weight of the evidence and the court erred in instructing the jury.

The plaintiff, who was 72 years old, occupied

an apartment on the first floor of a building owned by the Witanowskis, who had arranged with Cook, a carpenter-contractor, to repair the stairs. The plaintiff went out on her rear porch, picked up a paper box, threw it, together with an old coat, over the railing down into the yard and then started down the stairs. Cook was at work at the time on the stairs, and he had removed one stringer from the stairway so that the steps which rested on it were left without support. The step gave way when the plaintiff stepped on it and she fell to the ground and was injured. Both Cook and the Witanowskis allege that the plaintiff had been warned of the repairs to the stairs, that the plaintiff was guilty of contributory negligence when she used the stairs paying no attention to the warning which she had allegedly received, and that she was also guilty of contributory negligence in not observing that Cook was working on the stairs at the time when she used them.

The evidence in the case is in sharp conflict. The plaintiff adduced evidence denying that she had been warned and that a person in her position on the stairs could see whether or not Cook was at the time working on them. The defendants produced evidence to the contrary.

At the request of the defendant Cook the court gave the jury two special interrogatories: (1) Did Mary Witanowski, on the morning of July 5, 1957, warn the plaintiff Irene Kotowski not to use the back stairs at

1457 Bosworth because Mr. Cook would be repairing the stairs that morning? (2) Was the plaintiff Pauline Kotowski guilty of negligence which proximately contributed to cause her injury? Both of the interrogatories were answered "Yes." Both of the interrogatories are consistent with the jury's verdict of not guilty as to both Cook and the Witanowskis. In plaintiff's post-trial motion she objects to the giving of both interrogatories. No objection was raised in the post-trial motion that the answers to the interrogatories were against the manifest weight of the evidence. Nor does she contend that the answers to the interrogatories are inconsistent with the general verdict. In Rubottom v. Crane Co., 302 Ill. App. 58, the court said: "Under the authorities there are several ways by which a party may escape from being conclusively bound by the special finding of the jury: (1) by specific objection to the special finding on the motion for a new trial, or (2) by filing a specific motion to set aside the special finding when the motion for a new trial is made." In this case the plaintiff did not follow the rule as laid down. Where the special finding is substantially conclusive of the fact on which liability depended and the objections to the answers thereto are not properly preserved, the objection that the verdict is against the manifest weight of the evidence cannot be considered by a reviewing court. Voigt v. Anglo-American Provision Co., 202 Ill. 462; Biggerstaff v. New York, C. & St. L. R. Co., 13 Ill. App.2d 85; Forslund v. Chicago

Transit Authority, 9 Ill. App.2d 290.

Rule 7 of this court and rule 39 of the Supreme Court provide that in the appellant's brief neither an assignment nor statement of errors is necessary; however, the rules further provide that the points and authorities in the brief shall consist of the propositions relied on in support of the appeal with citation of authorities. In appellant's original brief she makes no reference whatsoever to the interrogatories. Our rule 7, as well as rule 39 of the Supreme Court, also provides: "No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing." Schiff v. Schiff, 25 Ill.App.2d 157. The argument made in plaintiff's reply brief in response to the objections raised in the briefs of Cook and the Witanowskis in any case is not tenable. Upon this record this court has no right to consider plaintiff's contention that the verdict of the jury was against the manifest weight of the evidence.

Plaintiff also objects to certain instructions given by the trial court. She filed a supplemental abstract of record containing all the instructions and a certification of the court that the plaintiff duly objected to the giving of each and every instruction. In Saunders v. Schultz, 20 Ill.2d 301, at 314, the court says:

"With reference to the propriety of the instructions submitted by the trial court, the criterion reiterated in the case law has been whether the

jury was fairly, fully and comprehensively informed on the relevant principles, considering the instructions in their entirety. From the record it appears that this criterion has been met. Furthermore, as noted by the Appellate Court, since defendant did not assert the grounds now urged against the particular instructions at the instruction conference, his objections thereto are not well taken when interposed for the first time on review. Onderisin v. Elgin, Joliet & Eastern Railway Co., 20 Ill.App.2d 73, 77-78."

In the Onderisin case the court had the same question before it.

The court says (pp. 77-78):

"The purpose of the conference is to afford counsel an opportunity to object to or correct erroneous instructions. As officers of the court, counsel have a duty to cooperate with the trial judge to the end that the jury may be properly instructed. Enlightened trial practice does not permit counsel under the guise of trial strategy to sit idly by and permit instructions to be given the jury without specific objection and then be given the advantage of predicated error thereon by urging the error for the first time in a post-trial motion. Arboit v. Gateway Transp. Co., 15 Ill.App.2d 500, 512, and Tabor v. Tazewell Service Company, 18 Ill.App.2d 593, 153 N.E.2d 98, 102, were decided after the legislature had deleted the provision mentioned by defendant's counsel from the enacted amendment of section 67; yet in those cases it was held that the failure to assert objections to instructions at the conference precluded raising objections thereto on appeal."

In the case before us the trial court held a comprehensive conference on instructions. The proceedings in that conference appear in the record from page 719 to page 770. The proceedings in the conference have not been abstracted. Rule 6 of this court and rule 38 of the Supreme Court provide that the abstract should be sufficient to present every error relied on for reversal, and everything necessary to decide the questions raised on appeal must appear therein. 2 I.L.P. Appeal and Error, sec. 483. The

substance of the record should be abstracted so that it will not be necessary to resort to the record to determine the issues presented. Failure of the abstract to properly present errors relied on warrants the court in affirming the judgment. Department of Finance v. Bode, 376 Ill. 374, 376; 2 I.L.P. Appeal and Error, sec. 493.

The plaintiff in her brief objects to eight instructions given by the court on behalf of Cook and the Witanowskis. Two of the eight were objected to generally in the conference but were not objected to in the post-trial motion. In all of the others save one the objections made in the conference were inconsistent with those made in the post-trial motion, which objections generally were inconsistent with the objections argued in the plaintiff's brief. The one instruction, Witanowskis' instruction No. 7, where the objections seem to have been fairly consistent was in our opinion properly given.

We are bound by the decision of the Supreme Court in the Saunders case and we are not passing upon whether or not the trial court erred in giving the instructions objected to in plaintiff's brief. However, from the inspection we have made it is not apparent that the rulings of the trial court with reference to the instructions were of such a character that they would require a reversal of the judgment.

The judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

Schwartz, P.J., and Dempsey, J., concur.

Abstract only.

48058

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error.

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JOHN MCGUIRE,

Plaintiff in Error.

ERROR TO
CRIMINAL COURT
COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The defendant, John McGuire, together with one Robert Woods, was indicted for a conspiracy to "do divers illegal acts injurious to the administration of public justice, to-wit: Unlawfully, wrongfully, unjustly and corruptly to cause, obtain and procure the wrongful discharge and release" of one Ferris, who had been charged in the Municipal Court of Chicago with operating an automobile while under the influence of intoxicating liquor. McGuire was tried jointly with Woods in the Criminal Court of Cook County, jury was waived and trial took place before a judge. Both defendants were jointly convicted and sentenced to six months in the county jail. To review that judgment McGuire sued out a writ of error in the Supreme Court, which transferred the cause to this court.

McGuire contends that the trial court erred in refusing to quash the indictment, that the court should have sustained his motion for a separate trial, and that the State failed to prove its case against him beyond a reasonable doubt.

A conspiracy is a confederacy of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Franklin Union v. The People, 220 Ill. 355, 376. To constitute a conspiracy under our statute there must be a concert of will and endeavor on the part of two or more persons to commit the unlawful act. Mere knowledge, acquiescence, approval or attempt on the part of one to perpetrate the unlawful act does not constitute conspiracy. People v. Bain, 358 Ill. 177, 190; Evans v. The People, 90 Ill. 384. In People v. Mulford, 385 Ill. 48, at page 54, the court says:

"We agree that the law is as claimed by the People and as lately pronounced by us in the case of People v. Meisenhelter, 381 Ill. 378, that a conspiracy need not be proved by direct evidence of an express agreement to do the unlawful thing to be accomplished; that the commission of the crime may be proved, not only by direct evidence but as well by inference from conduct which discloses a common design on the part of the accused to act together in pursuance of the common criminal purpose; and that where a conspiracy is established, every act or declaration of any of the conspirators in furtherance of the common purpose is regarded as the act or declaration of each of them and may be proved as against all. * * * Circumstances arousing a mere suspicion of guilt are insufficient. Conspiracies cannot be established by a mere suspicion, nor does evidence of mere relationship between the parties, or association, show a conspiracy. (15 Corpus Juris Secundum, pp. 1150-1151.)"

In spite of the fact that the indictment only names Woods and McGuire as parties to the conspiracy, the theory of the State must have been that Woods, Ferris and McGuire were coconspirators. The trial court accepted the testimony of the State's witnesses as true. However, even considering



that such evidence was true, there is no evidence proving McGuire a coconspirator. 11

On the day of the trial Ferris, the complaining witness, was so intoxicated when he first took the stand in the morning that the court ordered a bailiff to take the witness in charge and sober him up. That afternoon Ferris was brought into court and testified.

The evidence adduced by the State was that Ferris had been charged with driving a car while intoxicated. Ferris believed that the police were prejudiced against him because of the fact that when he was first arrested he had committed a nuisance in the police station causing considerable resentment on the part of the police officers. Ferris had known McGuire for a number of years. He asked McGuire about the "ticket" which he had received, and at the time McGuire told him he should hire a lawyer. Thereafter Ferris did talk to a lawyer and paid him \$25, but decided that the fee which the lawyer asked was too high. He then contacted Woods, who was a clerk in the traffic division of the Municipal Court of Chicago. Ferris testified that he drove McGuire to Woods's home, that McGuire introduced him to Woods and then left to go to the dentist; and that McGuire said nothing to him about procuring a wrongful verdict or judgment. Ferris further testified that he told Woods his story and that Woods "said that he would tell the Judge to listen to my case because otherwise, I talked to a lot of people and they said that I didn't have a chance. If you were charged with

drunken driving you didn't have a chance with a Judge and that he would have the Judge listen to my case and he would mention my name and when my case—in case my case didn't come up before the Judge that he would get me a lawyer and have the case before the Judge that he talked to because he said the Judge wouldn't listen to my case because they would listen to the Officers rather than me." Ferris also testified that at that time he did not know that Woods worked in the traffic court; that Woods told him that he would get him a lawyer and it would cost him \$200 for attorney's fees and that whatever the fine was would come out of the money; that he gave Woods \$200 and Woods did contact a lawyer for him; that that attorney did not represent him but an attorney was appointed by the court; that the fine was paid out of the \$200 and he got \$50 back.

The State also introduced a transcript of a statement from Woods taken in the State's Attorney's office, in which Woods stated that he talked alone with Ferris; that he was not introduced to Ferris by anyone; that he told him he knew a lawyer who would get him a fair trial; and that he did receive \$200 from Ferris. The court stated that the statement should not be considered as binding on McGuire.

Both McGuire and Woods testified that Ferris was not accompanied to Woods's home by McGuire nor was he introduced to Woods by McGuire.

A lawyer testified on behalf of Woods that Woods had talked to him about a retainer in connection with Ferris,

which he declined because he did not want the case, and that in case he received a retainer he would keep it no matter how the case ended. Woods had given Ferris a receipt for the \$200 which stated that in case Woods was not satisfied with the disposition of the case the money would be refunded to Ferris. Ferris further testified that he told Woods to keep the money and pay the fine, and that the amount of money paid back to him plus the money paid for the fine amounted to \$200.

In his testimony Woods denied that he had told Ferris he would talk to a judge. He stated that he did not discuss the case with McGuire nor did he have any agreement or understanding with him whatsoever; that Ferris came to Woods's home alone; and that Ferris was not introduced to him by McGuire.

In his own defense McGuire testified that he had known Ferris for some time and that Ferris had asked him to interpret the "ticket" for him; that he told Ferris that he needed a lawyer; that Ferris had said he would see a precinct captain; that McGuire said that a precinct captain could not do him any good and that he had to get a lawyer; that he (McGuire) knew Woods but that Woods was not his precinct captain; that Ferris had Woods's card and asked McGuire if he knew Woods and he told Ferris he did.

Prior to Ferris' meeting with Woods the entire discussion between Ferris and McGuire was with reference to Ferris getting a lawyer. However, Ferris stated that after he had discussed with McGuire his attempt to see his alderman and ward committeeman that McGuire said that Ferris

could talk to his (McGuire's) precinct captain. From the evidence it appears that Woods was not McGuire's precinct captain, though McGuire knew who Woods was.

"The law is well settled that when a conspiracy is once entered into, each conspirator then becomes liable for all the acts of his co-conspirators done in furtherance of the objects of the conspiracy. In Lasher v. Littell, 202 Ill. 551, on page 555, the court said: 'The conspiracy being established, everything said, written or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by everyone of them and may be proved against each.' And in Chicago, Wilmington and Vermilion Coal Co. v. People, supra [214 Ill. 421], on page 452, that 'after an unlawful combination is formed, the acts of the different parties to the combination which tend to further its purposes bind all parties to the combination.'" Franklin Union v. The People, supra. See also People v. Barkas, 255 Ill. 516, and People v. Meisenhelter, 381 Ill. 378. The conversations and acts of Woods after he had met Ferris cannot be used against McGuire. It was not established that a conspiracy in which McGuire participated had existed before Ferris contacted Woods. There is no evidence in the record showing any further contact between McGuire and either Ferris or Woods after Ferris met Woods. It was not shown that any conspiracy or understanding existed between McGuire and others to illegally procure the discharge of Ferris. If we accept the State's version that McGuire introduced Ferris to Woods, that fact, standing alone,

would not constitute a "concert of will and endeavor" on the part of McGuire and others to commit an unlawful act.

The only testimony in the record connecting McGuire with the alleged conspiracy is the fact, according to the State's version, that he introduced Ferris to Woods, but at the time of such introduction there is no evidence in the record, either direct or circumstantial, which would indicate that McGuire was endeavoring to have Ferris found not guilty in an illegal manner. The only evidence in the record, again taking the State's version, is that McGuire was attempting to aid Ferris in legally defending himself against the charge brought against him. In People v. Sheppard, 402 Ill. 347, at 351, the court says:

"In criminal cases it is the duty of this court to review the evidence, and, if there is not sufficient credible evidence, if it is improbable or unsatisfactory, or not sufficient to remove all reasonable doubt of defendant's guilt and create an abiding conviction that he is guilty, the conviction will be reversed. (People v. Willson, 401 Ill. 68; People v. Holt, 398 Ill. 606; People v. Bradley, 375 Ill. 182; People v. Kazmierczyk, 357 Ill. 592.) In the instant case the trial court accepted the complainant's version of the assault as the true one. However, we are of the opinion that even if the testimony of the People's witnesses is accepted, there is created thereby a conflict which raises a reasonable doubt as to plaintiff in error's guilt."

Furthermore, in the case before us the only testimony in any way implicating McGuire was the testimony of Ferris, who must logically have been a coconspirator under the State's version of the case and consequently an accomplice. In a conspiracy action the testimony of an accomplice is competent and conviction may

be had upon his uncorroborated testimony, provided the testimony is of such a character that it is sufficient to convince the trier of fact of the guilt of the accused beyond a reasonable doubt. The court, however, still must, as a matter of law, receive the testimony of an accomplice with suspicion and act upon it with great caution. People v. Moran, 378 Ill. 461, 465. The record indicates that the court accepted as true all the testimony of Ferris in spite of the fact that when he first came into court the morning of the trial of the case he was in a highly intoxicated condition. He was permitted to testify at the afternoon session of the court. The only evidence in the record which could in any way be construed as implicating McGuire is the testimony of Ferris that McGuire introduced him to Woods. There are no facts or circumstances in the record which tend to corroborate this testimony. Considering the entire evidence in the record concerning McGuire prior to any conversation between Ferris and Woods, the testimony of Ferris, standing alone, is not sufficient to establish the existence of a conspiracy beyond a reasonable doubt.

Ordinarily where the reviewing court reverses the judgment it will not inspect the record to find grounds substantiating its position. However, the State in its brief in the instant case refers this court to the pages of the record where the trial court discusses the evidence upon which it based its judgment. In that record the trial court apparently misapprehended the testimony since it states as one of the

grounds for finding McGuire guilty that Ferris had testified that McGuire had told him that "unless he had a friend in court the court would accept the statement of the police and disregard the statement of the individual defendant." That statement was **not** made by Ferris at any time concerning McGuire but was a statement which Ferris testified that Woods made to him after McGuire stepped out of the picture. Had that statement been made in the preliminary conversation between Ferris and McGuire there would be some basis upon which the existence of a conspiracy might be postulated. The court also was confused about the monetary transactions between Woods and Ferris.

Under the view which we take of this case it is not necessary for us to consider other contentions raised. The judgment of the Criminal Court of Cook County is reversed.

Reversed.

Schwartz, P. J., and Dempsey, J., concur.

Abstract only.



48135

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

ROBERT TAYLOR (Impleaded),

Plaintiff in Error.

)
)
) ERROR TO CRIMINAL
) COURT, COOK COUNTY.
)

29 1A^{2d} 143

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED
THE OPINION OF THE COURT.

Defendant Robert Taylor and one William Foster were indicted for conspiring with Virginia Clark to sell narcotic drugs. Defendants pleaded not guilty and waived trial by jury. Both were found guilty. Robert Taylor was sentenced to a term of not less than one nor more than five years. He took his case directly to the Supreme court by writ of error, and that court transferred the case to this court. The principal contention is that the evidence on which defendant was convicted was circumstantial and was insufficient to prove his guilt beyond a reasonable doubt.

On January 8, 1958 a police officer, George T. Sims, Jr., and another officer named Noble arrested Virginia Clark at 4330 Lake Park Avenue, Chicago, searched her pursuant to a search warrant and found her to be in possession of narcotics. After some conversation with respect to accomplices, she agreed to co-operate in their detection. Pursuant to plan, they went to a drugstore at 43rd Street and Drexel

Boulevard, where Virginia Clark entered an open telephone booth. It was about 10:00 o'clock in the evening. She then followed the procedure which she testified she had used daily for a week prior to her arrest. She dialed Drexel 3-3082 and asked for "Bob." The woman who answered the telephone replied that Bob was not there but was expected back shortly. A second telephone call was made at 10:30 P.M. This time the answer came: "This is Bob." Virginia Clark said she was Leather's wife (Leather is her husband's nickname) and that she wanted to loan a half dollar which, by previous arrangement, meant she wanted to purchase half an ounce of heroin. Bob said: "Go to the same place." That was 824 East 47th Street, a bowling alley. She was given currency by Officer Sims, who had made a record of the serial numbers on the currency. The police officers and Virginia Clark then went to the bowling alley. There she found defendant Foster, from whom she had previously purchased heroin as directed by Bob, and she gave him the money. He left for a few minutes and came back with a package which he handed her. That part of the transaction was observed by Officer Charles Wilson who corroborated Officer Sims' testimony. The package was identified as heroin. Sims and Noble then arrested Foster and found on his person the bills having serial numbers corresponding to those of which

Sims had kept a record.

Sims had previously traced the telephone number at which Virginia Clark reached Bob. It was in the name of Fannie Taylor, 5021 Calumet Avenue. After Foster's arrest the police officers and Foster went to that address on Calumet Avenue, found the name Taylor and rang the bell. Sims asked Foster to say to whomever responded that it was he, Foster, who wanted to see Bob, but Foster refused, saying he did not want Bob to think he had brought them there. A woman's voice answered the doorbell. After some discussion the door was opened a little. The officers pushed their way in. Sims showed his badge. Taylor and his mother appeared. According to Sims, Taylor at first denied but later admitted that he was Bob and that he had had a conversation with "Leather's woman" (meaning Virginia Clark). Foster asked Sims in the presence of Taylor to "put the weight" on him. He said Bob was in enough trouble. He was on parole. "Put the weight on me." Bob said nothing to this. Sims further testified that at the Narcotics Bureau Taylor again admitted he was Bob. Foster and Taylor were then taken to the police station. Foster denied categorically the material part of the story as told by the police officers and Virginia Clark. Taylor testified to an unsupported alibi. Thus the case turns on the credibility of the witnesses.

The credibility of witnesses is for the trier of fact to determine. The court in this instance saw and heard the witnesses and this gives him a great advantage over a reviewing court which has nothing but the cold record before it. People v. Meisenhelter, 381 Ill. 378, 391, 45 N.E.2d 678, 685; People v. Moretti, 349 Ill. App. 67, 75, 109 N.E.2d 915, 918. The voice which responded to Virginia Clark's call was, according to her testimony, the one which had responded on previous occasions when she had sought to procure narcotics and pursuant to the same arrangement had gone to the bowling alley and purchased heroin from Foster. The telephone number was definitely identified by a telephone company official as belonging to Fannie Taylor at the address at which Bob lived, 5021 Calumet Avenue. It is true that the testimony of an accomplice is subject to grave suspicion and should be acted upon with great caution. People v. Harvey, 321 Ill. 361, 152 N.E. 147. It is also the law that the suspicion goes only to the accomplice's credibility as a witness, of which the trier of fact is the judge. People v. Meisenhelter, supra.

Defendant argues that the evidence was circumstantial and therefore had to exclude every reasonable hypothesis. The evidence was only partially circumstantial. A large part of it appears to us to have been direct—the actual conversation over the telephone, the identification

of the voice, and the admissions of Bob. This, combined with the strong and persuasive evidence of a sequence of circumstances all fitting into one pattern, makes a convincing case.

It is possible, as defendant would have us believe, that Virginia Clark and Officers Sims and Wilson who testified were not telling the truth and that Taylor and Foster were victims of diabolical perjury, but the trial court heard them, and an examination of the record clearly provides ample basis for his findings. It is always possible to conjure up hypotheses inconsistent with a defendant's guilt, but the requirement that guilt be proved beyond a reasonable doubt does not mean that the court or jury must disregard inferences which flow normally from evidence before it. People v. Russell, 17 Ill. 2d 328, 331, 161 N.E.2d 309.

Defendant relies largely on People v. Boyd, 17 Ill. 2d 321, 161 N.E.2d 311. In that case, the testimony which linked the defendant with the sale consisted only of the identification of a voice by two witnesses, both of whom were police informers and narcotic addicts. In the instant case, it is true that Virginia Clark was a narcotics addict, as before related, but the identification is established by other facts and circumstances, including testimony with respect to the admissions of defendant.

It is also argued that there was no communication between Taylor and the alleged coconspirator. The indict-

ment charges that Taylor and Foster conspired with Clark. The communication between Clark and Taylor is established by the corroborative evidence of Sims, Taylor's admission, the circumstance of the telephone number corresponding with Taylor's address, and other persuasive circumstances. The evidence shows that Clark communicated with Foster as directed by Taylor and the illegal purpose as planned was accomplished.

There was a fair trial and the judgment and sentence are supported by the evidence.

In his briefs in the Supreme court, defendant raised a constitutional question. The transfer to this court removed that question from the appeal. City of Chicago v. Campbell, 27 Ill. App. 2d 456, 170 N.E.2d 19; Guttman v. Estate of Guttman, 28 Ill. App. 2d 85, 87.

Judgment affirmed.

McCormick and Dempsey, JJ., concur.

Abstract only.

89 #1

48158

IN THE MATTER OF THE ESTATE OF
DEMITRO MAXIMIUK, a/k/a
Demetro Maximiuk, a/k/a
Demetro Maksymiuk, a/k/a
Dmytro Maksymiuk, Deceased.

SHEVCHENKO SCIENTIFIC SOCIETY,
INC., a Non-Profit Corporation,

Plaintiff-Appellant,

v.

MICHAEL BARAN, etc., et al.,

Defendants.

MICHAEL BARAN, a/k/a Michael Baron;
PHILIP T. WASYLOWSKY; MARY
SHPIKULA; THOMAS J. DOWNS, Pub-
lic Administrator of Cook County
and UNKNOWN HEIRS of Demitro
Maximiuk, etc., Deceased,

Defendants-Appellees.

APPEAL FROM

CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The issue in this case concerns the admittance to probate of a carbon copy of a missing will.

In May 1955 Demitro Maximiuk, a bachelor 67 years of age, executed his last will and testament. He named his close friend, Michael Baran, executor and the Ukrainian Scientific Society of New York City (later identified as the Shevchenko Scientific Society, the plaintiff-appellant) his sole beneficiary. The will, prepared in triplicate by his attorney, consisted of three typewritten pages. His signature on the last

page of the original will was attested by two witnesses. He was given the original, to which a blue-back had been attached, and an unsigned copy which had no outside cover.

In February 1956, Maximiuk died of asphyxiation caused by a smoldering electric blanket. Two policemen, who entered his smoke-filled apartment immediately after his death, found several papers which they turned over to the Coroner of Cook County. Among these papers, inventoried by the police and checked and receipted for by the Coroner, was one listed as a "Last Will and Testament."

A week after receiving the papers the Coroner released them to Mary Shpikula, the assistant secretary of a local brotherhood of the Ukrainian National Association. The decedent had been treasurer of the brotherhood and he had made it the beneficiary of a \$2,500.00 insurance policy. He also left a smaller policy, issued by the Ukrainian National Association, to defray his funeral expenses. The assistant secretary went to the Coroner's office with the undertaker to obtain the latter policy for the purpose of paying the funeral bill. She was authorized to do this by Philip Wasylyowsky, the president of the brotherhood. At the trial of this case in the Probate Court, in response to a subpoena duces tecum, Mrs. Shpikula produced all the papers she received from the Coroner. Among them was an unexecuted copy of the will. She testified that this was the only will given her by the Coroner.

In March 1958, the Shevchenko Society filed a petition in the Probate Court to have the unexecuted copy admitted to probate as Maximiuk's will. Baran, Mrs. Shpikula, Wasylowsky, the Public Administrator, to whom letters of administration had been issued, and "unknown heirs" were among those named as respondents.

The petition alleged that the original will had been found in the decedent's apartment, that Baran, Shpikula and Wasylowsky either had possession of it or had knowledge of its whereabouts, and that if the will was lost or destroyed it was not done with the decedent's knowledge or consent because it was in existence at the time of his death. A copy of the petition was served on the State's Attorney who entered his appearance and participated in the trial in the Probate Court and later in the Circuit Court. In the trial de novo in the Circuit Court the case, by stipulation, was submitted on the record made in the Probate Court. The only additional evidence offered was the testimony of one witness. The Probate Court denied the petition and the Circuit Court did likewise. Neither the respondents nor the State's Attorney filed briefs or otherwise appeared in the Appellate Court.

It is the plaintiff's theory that the will turned over to the Coroner was the original, and it is implied that thereafter someone, somewhere along the

line, substituted the copy for the original. At the trial the plaintiff attempted to prove the existence of the original will through the testimony of three persons who allegedly saw it in the decedent's rooms shortly after his demise. Two of these were the policemen. One said that on a table in the apartment he found many papers, some insurance policies, a bank book of a joint account in the names of Maximiuk and Baran, and "what appeared to be a will, or a testament." He said he "thought" it had a blue-back. When asked to describe the document he replied, "...the only thing I can remember, it had I think it had his name Demetrius, on there, and the Last Will and Testament, if I am not mistaken, on the inside cover, I didn't look it all over." On cross-examination he said that among the papers there was one with a blue-back and that he was "pretty sure" it had "Last Will and Testament on it." He said he did not remember if it was folded or open, and it looked to him "like it was originally typed." He said although there were more pages he only looked at the first page. Asked if there was a signature, he replied: "I believe there was, but I didn't go into the back of it. I didn't look at the last page." He said this document was the "will" included in the papers turned over to the Coroner's office.

The second officer was even less definite. He said he saw a folded will on the table, which he didn't read, but that he knew it was a will because his partner



said so. He further testified, "the instrument that I saw that day had heavier paper, but I don't know what color or anything else.... It was folded over and it was a different color when you opened it." When asked whether the will had a blue-back, he answered, "I have nothing to do with wills. I never handle wills. The only thing that I know is the stuff was sent to the Coroner's office. We got the receipt back after it was all inventoried."

The third witness, who was the only one who testified in the Circuit Court, was the son of the decedent's landlady. He opened the door to admit firemen and was there when the policemen arrived. He saw the officers pick up a paper and heard one say it was a will. He testified that he looked at it but did not read it and that "There were three sheets and it had a back blue ground" [sic].

The circumstances in this case contradict any inference which might be drawn from the recollection of the three witnesses that the document with the blue-back, if there was such a document, was the original will. Maximiuk was given the original and one copy. The attorney, who drafted the will, retained the other copy; he identified the copy in dispute as the one he had given Maximiuk. The policemen found only one will. They gave this to the Coroner. The Coroner's record shows he received but one. That this was called a "Last Will and

Testament" by the policemen and a clerk in the Coroner's office does not make it so, and is readily explained by the caption on the first page of the copy which was:

"LAST WILL AND TESTAMENT

OF

DEMITRO MAXIMIUK"

In speaking of a document so captioned, laymen would naturally refer to it as the will of Demitro Maximiuk. There is no evidence that anyone looked at any page other than the first, or saw the decedent's signature or the signatures of the attesting witnesses, or saw whether the "will" was or was not revoked. One policeman said he believed there was a signature, but he also said he did not look beyond the first page. The testimony of the witnesses to the will indicated that Maximiuk signed only once and on the last page. Under these conditions but little weight can be given the term "will" ascribed to the document by these witnesses.

Where did the copy come from and how did it get in the Coroner's custody if not from the police? The plaintiff's suspicions are directed at Baran and Mrs. Shpikula. Implications are made that Baran came across the copy in Maximiuk's apartment and either inserted it in the Coroner's file and extracted the original, or that he gave the copy to Mrs. Shpikula, who substituted it for the original she received from

the Coroner. No motive is suggested for their doing this. Neither is related to the decedent; neither stands to profit by his dying intestate. Maximiuk left no known relatives, although Baran testified he thought the decedent had a sister living in western Ukraine. If there is a sister she would inherit, or if there is none or if she cannot be found the estate would be deposited with the County Treasurer for the benefit of unknown heirs. Baran could benefit only if the original were probated; he would then, as the executor, be entitled to a fee.

Baran did have access to the apartment. A note among the decedent's papers requested that he be notified in case of accident. He visited the apartment several times after the policemen had removed the papers. On one occasion he obtained clothing for the burial and on another he cleaned up the premises. He testified that he did not see any will. He went to the Coroner's office to obtain the bank book of his joint account. He gave his receipt for this. There is no evidence that he obtained anything else. Mrs. Shpikula, as the agent of the brotherhood, received from the Coroner not only the insurance policies but all of the papers, for which she gave her receipt. No reason is suggested why she should testify falsely that the copy was the only will given her by the Coroner. The brotherhood and the society she represented had nothing to gain by her destroying the

original. No relationship with Baran was shown which would substantiate the intimation that he was the source of her copy and that she acted in collusion with him. The Probate Court chose to believe her as against the somewhat hazy testimony of the policemen. The Circuit Court chose to believe her testimony, as it appeared in the record, and the physical evidence that the copy was the document which was found, rather than the recorded testimony of the policemen and the testimony of the third witness, whom it saw and appraised. We see no reason for disturbing the conclusion reached by the court.

It is the law of our state that if a will executed and kept by a testator cannot be found upon his death, a presumption arises that it was destroyed by him animo *stale* *pr* revocandi. In re Estate of Moos, 414 Ill. 54, 110 N.E.2d 194.

In the Moos case the court pointed out other rules of law which are applicable to such a situation. The presumption is rebuttable but the burden is on the proponent of the will to prove its nonrevocation. To determine if it is unlikely that a testator destroyed his will, it is permissible to show his continuing warm feeling toward the beneficiaries named in the will and any declarations made by him shortly before his death concerning them, his intentions or his will. Consideration also is given to evidence that persons of adverse interest had possession of his will or access to it either before or after his death.

In this case there is no evidence that the decedent's earlier intentions remained unchanged or that he made any statements just prior to his death concerning his testamentary wishes. There is no evidence that anyone other than himself had possession of or access to his will before his death, and we have set forth what occurred after his death. It is emphasized that he gave much thought to the preparation of his will and that he was deeply interest in Ukrainian affairs and in the welfare of people of Ukrainian origin. It is argued that it would not be likely for him to destroy a will which left his estate to an Ukrainian organization when by leaving no will his estate would escheat and his Ukrainian friends would get nothing. This argument assumes that he would not make another will. There is no basis for this assumption. His death was sudden and accidental. No one knows what he had in mind, but there was testimony that he frequently changed his ideas. His attorney said: "He was a fellow that would think it over and then come back again and change it, and this thing, we have been preparing this will for three years about."

In each case where it is sought to have a copy of a missing will admitted to probate the question is whether the proof is sufficient to overcome the presumption of revocation. In this case it was not. We sustain the finding of the Circuit Court that no adequate proof was made that the original will was either in existence after the death of the decedent or had not been revoked by him intentionally.

Affirmed.

Schwartz, P.J., and McCormick, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
February Term, A.D. 1961.

FILED

Feb 2, 1961

PAUL V. WUNDER
Clark Appellate Court Second District

ARCH BAIRD,
Plaintiff-Appellee,
vs.
LEONARD LIEPOLT and HARTFORD
ACCIDENT & INDEMNITY COMPANY,
Defendants-Appellants.

Appeal from the
Circuit Court of
Lake County.

DOVE, J.

This is an appeal by the defendants, Leonard Liepelt and Hartford Accident and Indemnity Company, seeking the reversal of an order entered on September 21, 1960 by the circuit court of Lake County which granted plaintiff's motion to strike paragraph four and two sentences of paragraph nine of defendant's answer to plaintiff's amended complaint and denied defendants motion for judgment on the pleadings.

The record discloses that on June 12, 1956 Leonard Liepelt instituted, in the circuit court of Lake County, an attachment proceeding against Arch Baird and filed with the clerk an attachment bond with the Hartford Accident and Indemnity Company, as surety in the sum of \$2,000.00. A writ of attachment upon certain Lake County farm land belonging to Baird issued which was duly executed. On July 16, 1956 Liepelt filed his

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complaint seeking to recover from Baird a money judgment. On August 1, 1956 a default money judgment was rendered in favor of the plaintiff and against Liepelt. At the sheriff's sale of the attached property Liepelt became the purchaser and in December 1957 Liepelt received a sheriff's deed to the realty which he had purchased.

In March, 1958 Baird filed a complaint in the circuit court of Lake County against Liepelt seeking to vacate the money judgment rendered against him on August 1, 1956 and set aside the sheriff's deed which had been issued to ^{Liepelt} ~~him~~ in December 1957. Baird also sought the same relief in the original cause by a petition under section 72 of the Civil Practice Act. The two causes were consolidated for hearing and on September 30, 1958 a decree was rendered setting aside the sheriff's deed, vacating the money judgment and ordering an accounting of the amount due Liepelt. Upon appeal to the Supreme Court that court on September 24, 1959 affirmed the decree of the circuit court. (Liepelt v. Baird, 17 Ill. 2nd 429.)

On January 15, 1960 the instant two count complaint was filed by Baird against Liepelt and Hartford Accident and Indemnity Company and thereafter on March 12, 1960 an amended complaint was filed. After setting forth the foregoing facts the amended complaint alleged that by an agreement dated February 28, 1958 and amended on March 4, 1958, Baird employed David A. Bridewell as his attorney to represent him in the original attachment proceeding and agreed to pay him for handling the trial of said cause a contingent fee of 25% of the net market value of the farm and buildings which had been sold in the attachment proceedings; that thereafter and on October 14, 1958 this attorney fee agreement was amended and as

amended provided an additional contingent fee payable to David A. Bridewell and Arthur D. Vogel of 25 % of the net value of the farm and buildings in the event of an affirmance by the Supreme Court of the decree rendered by the circuit court.

The amended complaint then alleged that the net value of the farm and buildings was approximately \$36,000.00 and that as a result of the efforts of Messrs. Bridewell and Vogel, the plaintiff Baird became indebted to them for attorney fees in the amount of \$18,000.00. It was further alleged that Baird had expended \$302.33 for court costs and had been damaged in his business and reputation in the amount of \$10,000.00. Count one demanded judgment against the defendant Hartford Accident and Indemnity Company for \$2,000.00 and costs and Count two demanded judgment against Liepelt for \$28,302.33. Attached to the amended complaint were copies of the attachment bond and the several fee contracts.

The answer of the defendants filed June 7, 1960 admitted the allegations of the complaint with reference to the proceedings in the circuit court and set forth in haec verba the decree of September 30, 1958 and admitted its affirmance by the Supreme Court. The answer denied that the original attachment was improper or wrongful, alleged that defendants had no knowledge of the attorney fee agreements between plaintiff and his counsel and averred that any such contracts could not cast any liability upon the defendants. Defendants denied that the value of the farm and buildings referred to in the amended complaint is \$36,000.00, denied that they were indebted to plaintiff in any sum by reason of plaintiff's agreement with his attorneys, stated they had no knowledge as to the amount expended by plaintiff for court costs and prayed for strict proof thereof. The answer denied the allegation that Baird had been damaged in his business or reputation and denied liability to plaintiff in any amount.

The answer of the defendants set out in haec verba an order entered by the circuit court of Lake County on January 15, 1960 in the original proceedings after affirmance by the Supreme Court of the decree of September 30, 1958. This order found that Liepelt was entitled to recover from Baird the sum of \$2081.40 and ordered that unless that sum with interest was paid by Baird to Liepelt on or before April 15, 1960 the consolidated proceedings instituted by Baird, would be dismissed.

On July 8, 1960 plaintiff filed his motion to strike paragraph 4 of defendants answer and also strike the second and third sentences of paragraph 9 of the answer. Paragraph 4 of the instant amended complaint referred to the findings of the circuit court in the decree rendered in the original proceeding on September 30, 1958. The fourth paragraph of the answer to that paragraph of the amended complaint which plaintiff, by his motion, sought to eliminate, did not specifically admit or deny the allegations of paragraph 4 of the amended complaint. This paragraph of the answer recited that plaintiff had filed his complaint on March 5, 1958 praying that ^{the} money judgment rendered against him and the sheriff's deed issued to Liepelt be set aside as a cloud on plaintiff's title. In this paragraph of their answer the defendants set forth at length certain paragraphs of the complaint in the original proceedings and also the entire decree of September 30, 1958 and also the order of January 15, 1960.

Paragraph 9 of the answer of defendants stated that defendants had no knowledge of any contracts entered into between plaintiff and his attorneys with reference to attorney fees. The two sentences in this paragraph which plaintiff sought to eliminate by his motion were the allegations in this paragraph to the effect that such attorney fee contracts were effective only between plaintiff and his attorneys, could cast no liability on defendants and that as a matter of law there can be no recovery in this proceeding by plaintiff for attorney fees, damages or costs incurred in the prosecution by plaintiff of the consolidated causes.

On the same day this motion to strike the indicated portions of defendants answer was filed by the plaintiff, defendants filed their motion for judgment on the pleadings. On September 2, 1960 this motion by the defendants for judgment on the pleadings and the motion of plaintiff to strike the indicated portions of defendants answer were heard. The court granted the motion of the plaintiff to strike the indicated portions of the answer of the defendants and denied defendants motion for judgment. This order reads: "It is hereby ordered that:

- a. The defendants motion for judgment on the pleadings be and the same is hereby denied.
- b. The plaintiff's motion to strike paragraph 4 and the second two sentences of paragraph 9 of the defendants answer to the amended complaint be and the same hereby is granted".

It is this order which defendants seek by this appeal, to have reviewed.

Briefs were filed by all parties and a reply brief was filed by appellants all as provided by our rules. Counsel for all the parties have treated this order as a final and appealable one. It was only during the course of the oral argument by counsel for appellants in this court that it was suggested by the court to counsel that the order entered by the trial court was interlocutory and not a final appealable order or judgment.

All of the authorities are to the effect that there must be a final order or judgment in order to justify an appeal, (Smith vs. Dellitt, 244 Ill.⁷⁵, 76), and where there is no final order from which an appeal is prosecuted, an appellate court has no jurisdiction and the court must, of its own motion, dismiss the appeal. (Kircher v. Hamill, 239 Ill. App. 496).

An order sustaining a motion to strike portions of an answer and a counterclaim in a partition proceeding is interlocutory and not a final and appealable order, (McDonald v. Walsh, 367 Ill. 529, 533), and this court held in Carey v. National Tea Co., 351 Ill. App. 569 that after a verdict for the plaintiff had been returned, the order of the trial court granting defendant's motion for judgment notwithstanding the verdict is not appealable because it is not a judgment but just an order that the moving party is entitled to a judgment.

In Cook vs. East side Newspapers 301 Ill. App. 362 the court said a denial of a motion by defendant for judgment was not a final appealable order, and in Boker vs. Boker, 13 Ill. App. 2d 57, 140 N.E. 2d 739, it was expressly held that an appeal from an order denying defendant's motion for judgment on the pleadings was not an appealable order. It was there held that in order for a judgment to be final and appealable the judgment must dispose of the subject matter of the proceeding and leave nothing to be done except enforce by execution what has been determined.

The order in the instant case merely sustained the motion of the plaintiff and directed that certain parts of the answer of the defendant be stricken. The same order denied defendant's motion for judgment. No final judgment of any kind was rendered. The pleadings raise issues of fact which are now pending and undisposed of in the trial court.

The only order consistent with the authorities which this court has jurisdiction to enter is to dismiss this appeal.

Appeal Dismissed.

SMITH, P.J. CONCURS

McNEAL, J. CONCURS.

29.11.5

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10325

AGenda No. 20

Almon R. Mann,
Plaintiff-Appellant,
vs.
R. Zink Sanders,
Defendant-Appellee.

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Appeal from the
Circuit Court of
Macon County

291
291A-291B

CARROLL, Presiding Justice.

This is an action for damages allegedly occasioned by the negligence and unskilled acts and omissions of the defendant, a medical doctor, in treating the plaintiff.

Substantially the allegations of the complaint are that either during December, 1955 or January, 1956, plaintiff applied to defendant, who was a physician practicing in Decatur, Illinois, for treatment for the alleviation or cure of a throat ailment, which was manifested by hoarseness and discomfort; that through the date of July 22, 1957, plaintiff continued to consult defendant for examination and treatment of said ailment; that during said period plaintiff complained of continued hoarseness and discomfort and on numerous occasions requested defendant to examine plaintiff's throat to determine the presence or absence of a cancer; that defendant was

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guilty of negligence in treating plaintiff in failing to use the usual and customary method of examination for the detection of malignancy, in failing to make an examination for such particular ailment although requested to do so by plaintiff; that as a direct and proximate result of defendant's negligence, plaintiff was not cured of his ailment but the same continued to become more serious; that as a further result the cancer was permitted to grow in plaintiff's throat; that the cancer and plaintiff's larynx were removed by surgery and that by reason thereof plaintiff has been permanently disabled and disfigured.

Upon issue being joined, the cause proceeded to trial before a jury. At the close of plaintiff's evidence the court directed a verdict for defendant and entered judgment in bar of plaintiff's action. The sole question presented by this appeal is whether or not the trial court erred in refusing to submit the case to the jury.

In passing upon such question, we are required to recognize and conform to certain fundamental rules. We are precluded from weighing the evidence and our examination thereof is limited solely to the purpose of determining whether, as a matter of law, there is any evidence in the record to prove the essential elements of plaintiff's case. All of the evidence must be considered in its aspects most favorable to plaintiff with all reasonable inferences to be drawn therefrom. If when so considered, there is a total failure to prove one or more essential elements of the case, then a motion for a directed verdict was properly allowed. Tucker v. NYC & St. Louis RR Co., 12 Ill. 2d, 532; Mitchell v. Van Scoyk, 1 Ill. 2d, 160; Friesland v. City of Litchfield, 24 Ill. App. 2d, 390. Accordingly, the scope of our consideration of the evidence is limited to deter-

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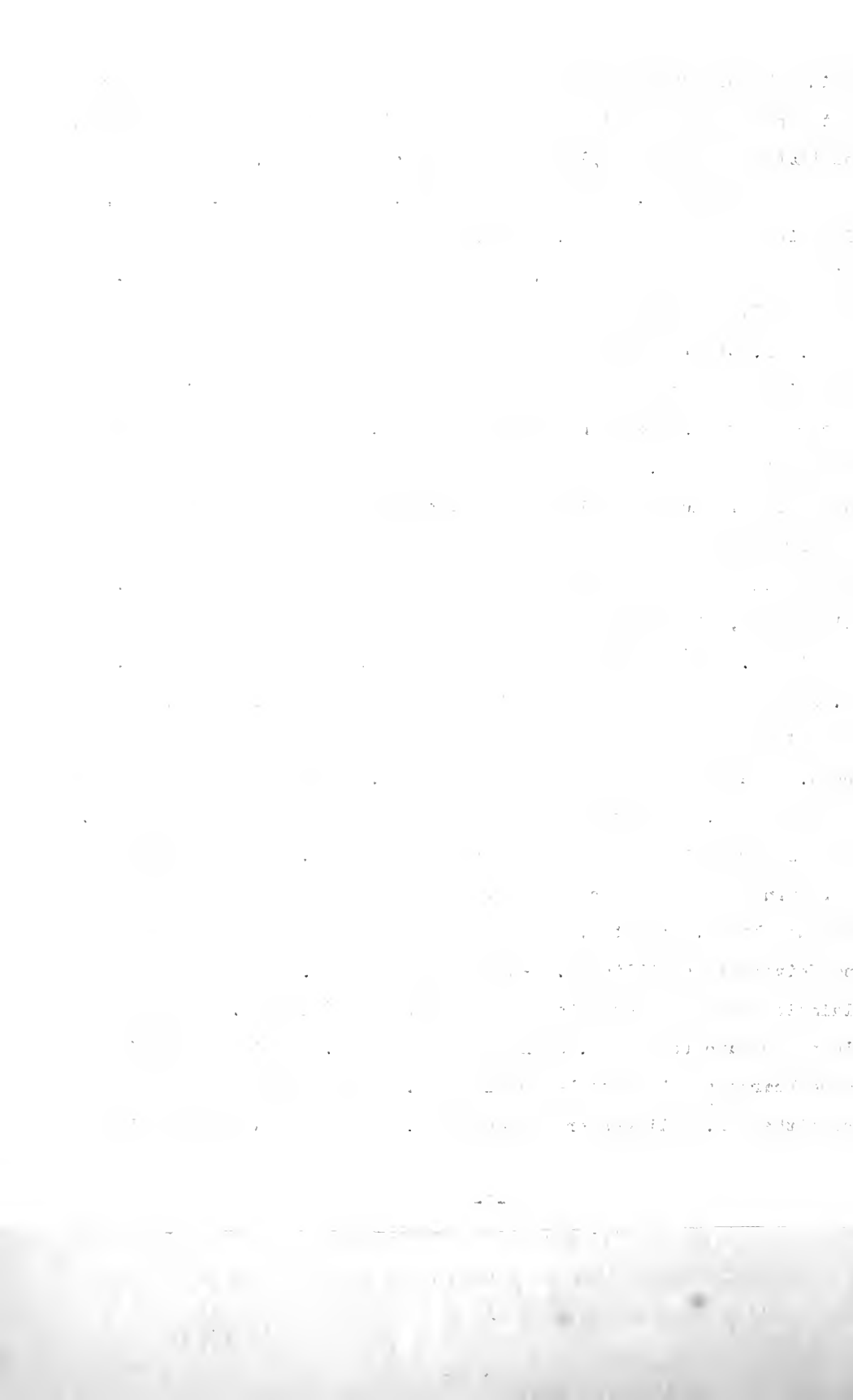
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mining whether there is any evidence tending to prove the negligent acts and omissions with which defendant is charged in the complaint, and that the injury complained of resulted therefrom.

Plaintiff, an insurance broker, who was 62 years of age, lived in Decatur, Illinois. On June 11, 1954, he noticed that his voice was continually hoarse. On July 30, 1954, he consulted Dr. Frank Snell concerning the hoarseness which then had lasted 6 or 7 weeks. Dr. Snell examined his throat using a light and mirror and prescribed a liquid medicine. The hoarseness was not relieved and he again saw Dr. Snell on October 18, 1954. Dr. Snell then arranged for him to see Drs. Holinger and Johnston of Chicago, specialists in larynxology, whose practice was concerned primarily with surgery of the larynx and esophageal regions and primarily with reference to cancers in those regions. On October 20, 1954, plaintiff saw Dr. Nelson Jack, his family doctor, who examined his throat with a light and mirror. On October 22, 1954, he saw Dr. Holinger in Chicago. Dr. Holinger examined plaintiff's throat with a light and mirror and told him if the hoarseness persisted he should return in about 6 weeks. Plaintiff did not return to see Dr. Holinger at the end of the 6 week period. He continued to remain hoarse and frequently saw Dr. Jack who prescribed medication for the condition. In September, 1955, he returned to the office of Drs. Holinger and Johnston and was examined by Dr. Johnston, who recommended speech therapy lessons at the University of Illinois. On that occasion Dr. Johnston told plaintiff that he wanted to see his throat in 6 months. Plaintiff did not return to see Dr. Johnston in 6 months. Plaintiff continued to be hoarse and in December of 1955 Dr. Jack suggested he return to see either Dr. Holinger or Dr. Johnston. Instead of adopting this



suggestion plaintiff went to see the defendant. Dr. Sanders, on December 16, 1955. His primary purpose in so doing was to obtain a certificate which he required in order to continue his voice corrective course. Called by plaintiff as an adverse witness, Dr. Sanders testified that he had practiced medicine in Decatur, Illinois for many years; that his practice was limited to eyes, ears and throat; that he had specialized in such field for 49 years; that he was familiar with the usual and customary practice of physicians in the City of Decatur in examining for and diagnosing cancer of the throat; that such practice was the use of a laryneal mirror; that on December 16, 1955 he used this method in examining plaintiff's throat; that he found no evidence of cancer and so informed plaintiff; that his diagnosis was laryngitis and inflammation of the throat for which he prescribed some medicine; that plaintiff did not return to defendant's office until May 16, 1956, at which time defendant examined plaintiff's throat, using the same mirror method; that he found no malignancy; that on September 26, 1956, he again examined plaintiff using the laryneal mirror; that plaintiff as before complained of hoarseness; that he sent plaintiff to Dr. Requarth for consultation; that on July 22, 1957, plaintiff returned to defendant's office concerning an asthmatic condition and was given some pills; that on that date no examination was made; that 4 days later on a visit to defendant's office plaintiff brought with him a specimen of sputum; and that defendant saw nothing suggestive about such specimen. Defendant further testified that he told plaintiff on 2 or 3 occasions what he found; that he told plaintiff that he

didn't find any evidence of cancer; that on examination of plaintiff he could see the larynx; that if he had seen growth on the vocal cords or intense inflammation he would have felt there might be trouble of that kind; and that he did not send plaintiff to any other physician for the purpose of having an x-ray taken of his larynx nor did he take a biopsy for the reason that he saw no malignancy. About August 2, 1957, after having observed blood in mucous from his throat, plaintiff went to see Dr. Jack Brown. On August 9, 1957, he went to the Macon County Hospital where x-rays of his throat were taken. About August 15, 1957, Dr. Kenneth Johnston examined his throat with a light and mirror. Plaintiff then entered Presbyterian-St. Luke Hospital in Chicago where a tissue for a biopsy was removed from the larynx. Dr. Johnston's diagnosis was cancer of the larynx, which was in the sub-glottis area; surgery was then performed and the voice box removed.

The evidence also shows that in September, 1956, plaintiff, after seeing the defendant, was treated for his hoarseness by Dr. James C. Allen, a chiropractor. Plaintiff had about 7 chiropractic adjustments, including manipulation of his spine, but did not advise defendant of such visits to Dr. Allen.

Dr. Johnston testified that the cancer was in the sub-glottis area; that cancers in such area are more likely to spread to the lymph nodes than those in the glottis area and require removal of the larynx; that regardless of when discovered, the usual, customary procedure would be removal of the entire larynx; that when he first saw plaintiff in September, 1955, he examined him with a

mirror and light, which is the usual, customary and recognized procedure for making an examination of the larynx; that a mirror examination is usually adequate but that if for some reason the entire larynx cannot be visualized, then a laryngoscope is used; that the examination at that time disclosed thickening and redness of the cords which to him was an indication of laryngitis; that where there is persistent hoarseness the patient's case should be followed at regular intervals; that subsequent study and examination should be made with a mirror; and that unless he observed some change with the mirror examination he would not use other procedures.

Dr. William F. Hubble testified that he was a licensed physician in Decatur, Illinois specializing in diseases of the eye, ear, nose and throat; that he had observed and diagnosed the supraglottic, glottic and sub-glottic areas of the throat where cancer was present; that where cancer of the throat was suspected doctors using ordinary care and diligence would examine the entire larynx; that it was the usual and customary procedure to make such an examination with a mirror and light; and that if no growth was disclosed on a mirror examination, use of the laryngoscope would not be considered.

The rule as to the degree of care, diligence and skill which a physician or surgeon is required to bring to the amelioration of the condition of his patients is well established. In Schireson v. Walsh, 354 Ill. 40, it is thus stated:

"The law of this State is that a physician and surgeon is required to possess, and in his practice to use, reasonable skill--not, perhaps, the highest degree of skill that one learned in the profession may acquire, but reasonable skill such as physicians in good practice ordinarily use and would bring to a similar case in that locality. (Quinn v. Donovan, 85 Ill. 194; Utey v. Burns, 70 id. 162).

We believe that the rule adopted by the courts of this State as to what is required of a physician in the practice of his profession is a safe rule both for the public and the profession, and we are not disposed to depart from that rule or to enlarge the professional requirements of a physician or surgeon in the practice of his profession."

In a malpractice action, the burden of proof is upon the plaintiff to show the want of such skill and also to show that defendant's failure to possess and exercise the same resulted in the injury complained of. Before a plaintiff can recover in such a case he must show by affirmative evidence that the defendant was not skillful and was negligent and that such negligence and want of skill caused injury to the plaintiff. Olander v. Johnson, 258 Ill. App. 89. A physician does not warrant or guarantee a good result or that he will effect a cure, hence proof of a bad result is of itself no evidence of negligence or lack of care. The law also appears to be well settled that such proof can only be established by the testimony of experts skilled in the medical and surgical profession. Moline v. Christie, 180 Ill. App. 334; Graiziger v. Henssler, 229 Ill. App. 365; Sims v. Parker, Ill. 41/App. 284.

Upon careful examination of this record we find no evidence which under the authorities cited tends to show any lack of skill or negligence on the part of defendant in his examination or treatment of plaintiff's ailment. Likewise there appears to be no evidence tending to show that defendant's want of skill and care was the proximate cause of plaintiff's condition.

The medical experts testifying were Doctors Johnston, Hubble and the defendant. All of these witnesses testified that in making an examination of the larynx, it is the usual, customary and recognized procedure to use a light and mirror. This was the method

which defendant used in making his examination of plaintiff's throat. The evidence also shows that this type of examination was made by all of the doctors who examined plaintiff during the period from July, 1954 to July, 1957 and that none of these examinations disclosed the presence of cancer. Neither Drs. Johnston nor Hubble stated that in his opinion defendant's examinations were not those ordinarily and customarily made by physicians in the Decatur area. No expert witness expressed an opinion that the plaintiff's present condition was primarily caused by anything the defendant did or failed to do in his examination or care of the plaintiff. Furthermore, it may be observed, that any contention that the defendant was negligent in not discovering the cancer assumes it was discernible when his examinations were made. There is no evidence as to when it first manifested its presence and no such assumption is warranted.

If, as the complaint alleges, plaintiff's condition was the direct and proximate result of defendant's unskillful acts and omissions, then it was incumbent upon plaintiff to offer evidence tending to prove such charge. Manifestly, plaintiff has failed to make such essential proof. It is made clear by the experts testimony that plaintiff's condition was caused by a cancer which necessitated the removal of the entire larynx and that regardless of when the malignancy was discovered, the result would have been the same. On this point Dr. Johnston testified that:

"Cancers in the sub-glottis area are more likely to spread to the lymph nodes than those directly on the glottis area. Generally speaking, it is for that reason why the carcinoma, when discovered in the sub-glottis area, requires the removal of the entire larynx. Generally speaking, that is so regardless of the size of the growth. Generally speaking

I would say that regardless of when the particular squamous cell carcinoma would have been discovered in the sub-glottis area of the larynx of Mr. Mann, I would have, in my best medical opinion, considered that the operative procedure which I followed would have been the proper one."

In the face of such testimony any conclusion that earlier discovery of the cancer would have rendered plaintiff's surgery and injury less severe finds no basis other than in the realm of pure speculation.

Plaintiff's principal argument would appear to be that proof of defendant's failure to employ a procedure other than the use of a mirror and light in examining plaintiff's throat made out a case of negligence. As has been previously pointed out, proof of defendant's negligence could only be made by the testimony of experts in the field of medicine and surgery. None of the doctors testifying expressed the opinion that defendant's examinations of plaintiff did not meet the standard of skill and good practice required of a physician in the Decatur area. On the contrary, these experts were in agreement that such examinations were those customarily made in that community. There is no merit in plaintiff's argument.

Defendant has filed a motion to dismiss the appeal on the ground that plaintiff in failing to seek a new trial by filing a post-trial motion has waived his right to assign error on the trial court's action in directing a verdict for defendant. This motion has been taken with the case. As indicated by the motion it is defendant's theory that Sec. 68.1(2) of the Civil Practice Act requires that where, as in this case, the court directs a verdict

at the close of plaintiff's case, the plaintiff in order to preserve the right to appeal, must file a motion for a new trial. The section of the Practice Act to which defendant refers provides that relief desired after trial in jury cases must be sought in a single post-trial motion. It further provides that a party failing to seek a new trial in his post-trial motion waives his right to apply for same except in cases where the jury failed to reach a verdict. On this appeal plaintiff seeks to have the judgment reversed and the cause remanded for trial. He does not seek a new trial but has asked this court to review the trial court's record which includes its ruling on defendant's motion to direct a verdict and for its error in so ruling to reverse the judgment and remand the case for trial.

A motion to direct a verdict raises only a legal question whether there is any legal evidence tending to sustain the verdict. The ruling of the court on such a motion is a decision of the court made in the progress of the trial and is subject to review by an appeal court without a motion for a new trial. Yarber v. Chicago and Alton Railway Co., 235 Ill. 589; Pate v. Blair-Big Muddy Coal Co. 252 Ill. 198.

We are of the opinion that there is no evidence in this record to prove either the negligence of the defendant or that such negligence was the proximate cause of plaintiff's injury and accordingly the judgment of the trial court is affirmed.

Affirmed.

REYNOLDS and ROETH, JJ., concur.

DIVISION

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Page 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

FEBRUARY TERM, A.D. 1960

FILED

FEB 28 1961

PAUL V. WUNDER
Clerk Appellate Court Second District

TELEVISION LABORATORIES, INC., an
Illinois corporation, et al.,

Plaintiffs-Appellees

vs.

WALTER A. SCHWALM and RUTH E.
SCHWALM

Defendants-Appellants

and

WALTER A. SCHWALM et al.

Plaintiffs-Appellants

vs.

TELEVISION LABORATORIES, INC., an
Illinois corporation, et al.,

Defendants-Appellees.

29 I.A. 292

Appeal from the
Circuit Court
Lake County.

Per Curiam

This case involves two actions for Declaratory Judgments which were consolidated for trial before the court without a jury in the Circuit Court of Lake County, Illinois. The



principal issue in both cases and on this appeal is whether or not the by-laws of Television Laboratories, Inc., an Illinois Corporation, were validly amended at a shareholder's annual meeting on March 13, 1957, to increase the number of directors of Television Laboratories, Inc., from three to four. The trial court entered a judgment and decree holding that the by-laws had not been so amended and granted relief accordingly, from which judgment and decree this appeal is taken.

One case was originally filed in the Circuit Court of Lake County, and the other case was originally filed in the Circuit Court of Cook County. The latter case was transferred by order of the Circuit Court of Cook County to the Circuit Court of Lake County after which it was consolidated for trial with the Lake County action. The original Lake County action prayed for injunctive and declaratory relief, and was instituted by Television Laboratories, Inc., Edward F. Classen and John F. Pierce the Appellees herein, against Walter A. Schwalm and his wife, Ruth E. Schwalm, Appellants herein. The appellants in the Lake County action sought a declaration that there are only three directors of Television Laboratories, namely, Classen, Pierce and Schwalm; that Classen is President Maxine J. Classen, his wife, is Vice-President, and Charles G. Gillman is Secretary-Treasurer, and that Walter A. Schwalm

has no standing, save as a director.

In the original Cook County action, Walter A. Schwalm and Ruth E. Schwalm, his wife, sought a declaratory judgment against Television Laboratories, Inc., Classen and Pierce praying that the court would declare that on March 13, 1957, the by-laws of the corporation had been amended to provide for four directors, that the four directors are Schwalm, Classen, Pierce and Mrs. Ruth E. Schwalm. City National Bank & Trust Company of Chicago and Watsona National Bank were named as defendants to obtain an interim relief.

For a proper determination and consideration of this cause it is necessary to detail at some length the facts giving rise to the present litigation. Television Laboratories, Inc., was organized in 1947 for the purpose of manufacturing television sets and electronic parts and was a continuation of a partnership originally formed about 1944 by Schwalm and Classen. Schwalm and Classen made the same initial investment in the partnership and shared profits and losses equally. At the time of incorporation, Television Laboratories was authorized to issue 960 shares of common stock. Shortly after incorporation, 360 shares were issued to Classen and 360 shares to Schwalm in exchange for assets conveyed by them to the corporation. To raise additional capital the remaining 288 shares were sold to a number of other individuals. It is



apparent from the record that Schwalm and Classen were the primary stockholders and the persons principally responsible for the operation and success of the corporation.

The initial by-laws of the corporation provided that there should be "not less than three directors." Since the formation and organization of the corporation, Classen and Schwalm have been directors, and Classen has been President. Prior to the 1957 annual shareholders' meeting, the one in dispute, the third director was V. T. Mertz, a stockholder. Schwalm was Vice President-Treasurer and Ruth E. Schwalm, his wife, was Secretary.

In 1956 V. T. Mertz informed Schwalm and Classen that he intended to move from the State of Illinois and they agreed that his stock would be held as Treasurer stock reducing the number of shares outstanding to 800. Also about this time Classen and Schwalm concluded that it would be inconvenient for Television Laboratories, Inc. to have Mertz continue as a director. At a special meeting of the Board of Directors held in February, 1957, it was resolved that the resignation of Mr. Mertz from the Board of Directors be recognized and accepted, effective with the annual shareholders' meeting to be held in March, 1957, and that a new Director of Directors be elected at that time. In connection with the replacement of Mertz on the board, Classen apparently wanted to retain a

three man board and Schwalm expressed a desire for a four man board.

On February 20, 1957, Classen, as President, sent to all shareholders a notice that the annual shareholders' meeting would be held on March 13, 1957, and among the subjects stated to be considered at this meeting was a proposed amendment of the by-laws of the corporation proposing to increase the number of directors from three to four and the election of directors for the ensuing year. At the March 13, 1957, annual meeting Classen acted as Chairman and Ruth E. Schwalm acted as Secretary. Classen, prior to this meeting, prepared a typed agenda which Mrs. Schwalm, as Secretary, used to record notes for the preparation of the minutes. The items on the agenda included a discussion of Mertz's resignation and also the proposal to amend the by-laws to have four directors rather than three.

Classen, Schwalm, Pierce and all of the other stockholders of the corporation except two holding 40 shares were present. Classen testified that he raised the subject of the by-law change by stating that he and Schwalm were not in agreement on the matter of the number of directors and that Schwalm wanted four directors. Harry Lyons, a stockholder, said that if that would bring peace and harmony, he was for it. Classen then asked Lyons if he would put that in the form of a motion and



Lyons then moved that the by-laws be changed to provide that the number of directors be increased from three to four.

Pierce seconded this motion. Classen then called the roll and those in attendance voted in favor of it. At the time of the annual meeting of shareholders, held March 13, 1957, there were eight shareholders of the corporation and six were present at the meeting. Of the six there were in attendance two directors, Classen and Schwalm. V. I. Mertz was not present and there is a dispute between the parties here as to whether or not he was still a director. Harry Lyons, Marion Lyons, John Pierce and Sadie Pierce, shareholders, but not directors, were present.

Concerning the alleged amendment of the by-laws to increase the number of directors of the corporation from three to four, the minutes of the shareholders' meeting of March 13, 1957, indicate the following:

"The Secretary then read Article III, Section I of the by-laws calling for the election of directors of the corporation. Upon motion made by Harry Lyons and seconded by John Pierce, the following resolution was unanimously approved by the stockholders present.

BE IT RESOLVED that Article III, Section 1 of the by-laws of Television Laboratories, Inc. be changed to read as follows:

'Section 1. Number and Qualifications.
The business and affairs of the corporation



shall be controlled and managed by a board of four directors who shall be elected by the shareholders at the annual meetings, and who shall hold office until the next annual meeting of shareholders and until their successors shall have been elected and shall have qualified. The directors need not be residents of the State of Illinois."

Following the adoption of the foregoing resolution, the minutes indicate that the president called for nominations to the Board of Directors. Those nominated were Walter Schwalm, Edward Classen, Maxine Classen, Ruth E. Schwalm and John Pierce. Maxine Classen declined the nomination. Upon motion duly made, seconded, and unanimously carried, Walter Schwalm, Edward Classen, John Pierce and Ruth E. Schwalm were elected directors of the corporation.

Immediately after the shareholders' meeting the four persons alleged to have been elected directors held the annual meeting of the Board of Directors. At this meeting, Classen was re-elected President, Schwalm, Vice President-Treasurer, and Mrs. Ruth E. Schwalm, Secretary. Neither Classen or Schwalm objected to the participation of the four alleged directors at this meeting and thereafter both of them continued to draw their salaries as officers for the full year.

After the 1957 annual shareholders' meeting, the page in the by-laws containing Article III, Section 1 relating to the number of directors was re-typed so that it would read as

amended on March 13, 1957. On the re-typed page there is an asterisk following the words "four directors" and an asterisk at the bottom of the page which reads "as amended March 13, 1957". The old page was placed at the end of the by-laws, and across the face of Article III, Section 1, Classen wrote in his own hand, "Amended 3/13/57". On August 26, 1957, five months after the shareholders' meeting in dispute, the four alleged directors met again and unanimously declared a dividend of \$1.00 per share which was paid to all stockholders. Classen testified that he received and cashed his dividend check which was declared on August 26, 1957. Another special directors' meeting was held on March 26, 1958, immediately preceding the 1958 annual shareholders meeting. The alleged four directors were present and again a dividend (\$2.00 per share) was declared. Classen admitted that this dividend was actually paid and that he received and cashed his dividend check. The next day, on March 27, 1958, Classen wrote a memo to the treasurer directing him to pay the dividend declared and to issue a \$50.00 check "to each of the four directors in attendance at this meeting." (Emphasis Added).

It seems quite apparent and obvious, after the shareholders' meeting of March 13, 1957, that there was conflict between Classen and Schwalz and that the relationship between them deteriorated. In November, of 1957, Classen purchased a total

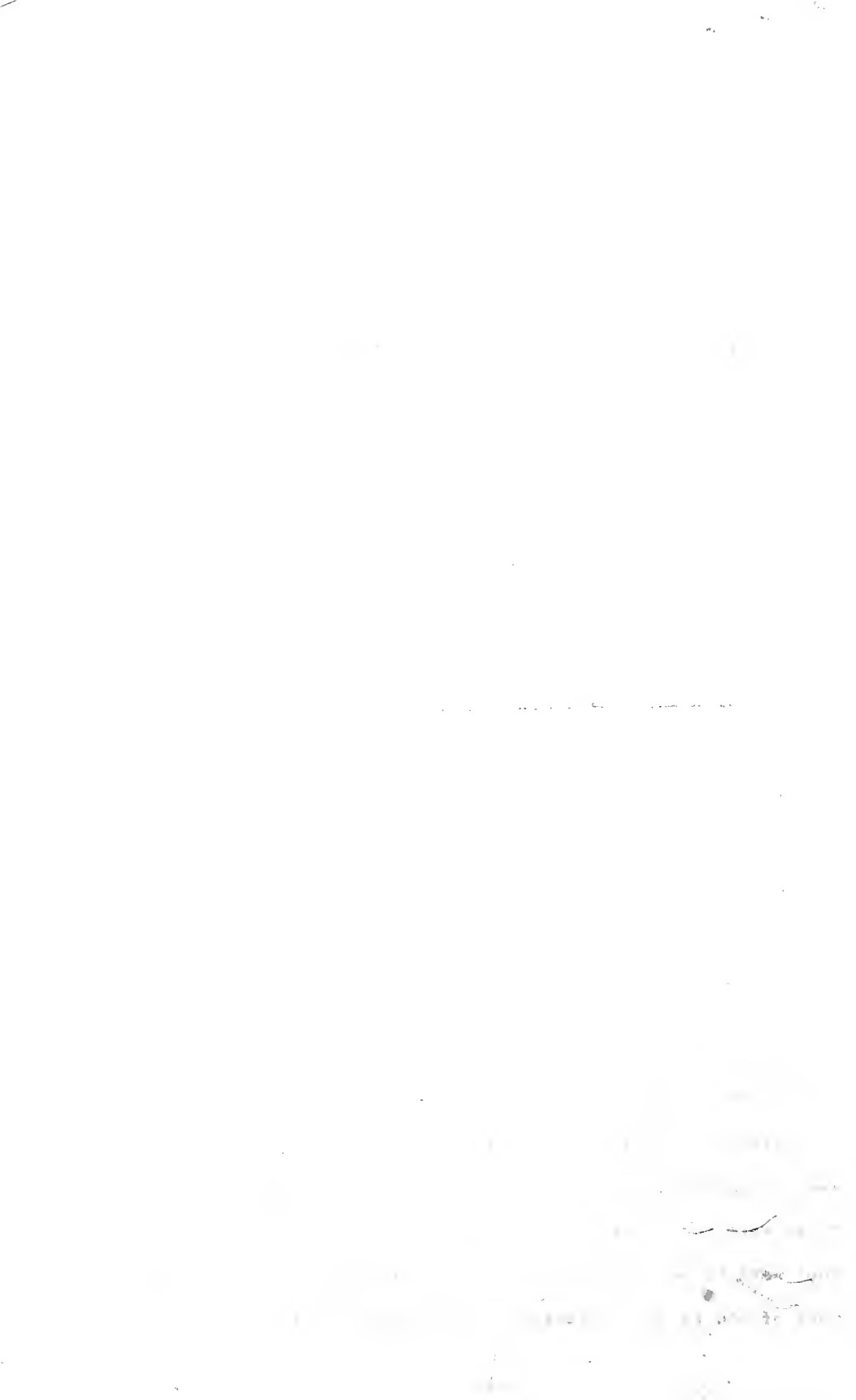
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Classroom and Laboratory
Notes, 1900-1901

of 88 shares of stock from two different shareholders giving him a total of 464 shares. At the time of the March, 1958, annual meeting of the shareholders of the corporation, Classen and his friends held 464 shares and Schwalm and his friends 336 shares.

At the annual meeting of the shareholders on March 26, 1958, Mrs. Ruth E. Schwalm, as Secretary, read the minutes of the 1957 shareholders' meeting. Classen, who was presiding, then stated that he took exception to the minutes and moved the adoption of a resolution amending the minutes to show that the resolution amending the by-laws at the 1957 shareholders' meeting was not adopted unanimously as stated but was adopted without his vote as chairman of the meeting and that he remained silent. Over Schwalm's objection, the resolution was approved 464 to 336. By a similar vote and over Schwalm's objection, the shareholders then adopted two resolutions rescinding the 1957 by-law amendment and restoring the original by-law. Schwalm objected on the ground that the shareholders could not change the by-laws.

Classen then announced that the next order of business was the nomination of directors for the coming year and that three were to be elected. Schwalm objected on the ground that four were to be elected. This objection was overruled by a vote of 464 to 336. Classen then nominated himself, Pierce



and Schwalm and Schwalm nominated Mrs. Ruth E. Schwalm. The nominees received the following votes: Classen, 696; Schwalm, 675; Pierce, 693; Ruth E. Schwalm, 672; Classen declared the first three elected. Schwalm objected on the ground that all four were elected, but this objection was overruled by a vote of 464 to 336.

The annual directors' meeting was held April 17, 1958, Directors Schwalm, Classen and Pierce were present. Mrs. Ruth E. Schwalm was present as Secretary and endeavored to participate and to vote as a director but Classen refused to recognize her as a director. At this meeting Classen and Pierce took action to relieve Schwalm of authority in the affairs of the corporation other than his directorship. By a vote of 2-1, Article III, Section 1 of the by-laws was amended to provide that the number of directors should be three. Also, by a 2-1 vote, Classen was elected president, and his wife Mrs. Classen Vice-President, and Gilman Secretary-Treasurer. Resolutions were adopted, by the same vote, naming City National Bank & Trust Company of Chicago and Wauconda National Bank as depositories of corporate funds. Mrs. Ruth E. Schwalm was removed as registered agent and replaced by Gilman. The final act at this Directors' Meeting, also by a vote of 2-1, was to discontinue Schwalm's salary effective the next day, April 18, 1958. All of the 2 to 1 votes at the Directors' Meeting resulted from

Classen and Pierce voting in the affirmative and Schwalm in the negative.

The theory and argument advanced by the Appellants for reversal of the judgment and decree of the trial court are as follows: (1) That all four of the alleged directors elected on March 13, 1957, intended to amend the by-laws to provide for four directors and by their conduct after the election they adopted by their own act the by-law amendment passed by the shareholders; (2) That Classen and Pierce having participated in, ratified and acquiesced in the by-law change have waived their right to challenge its validity, and (3) The rescission of the by-law amendment at the 1958 shareholders' meeting and amendment of the by-laws at the 1958 Directors' Meeting are ineffective.

To sustain the judgment and decree of the trial court, appellees urge and contend: (1) That pursuant to Sec. 25 of the Illinois Business Corporation Act, only the Board of Directors of an Illinois Corporation have the power to amend the by-laws where, as here, such power is not reserved to the shareholders; (2) The alleged amendment of the by-laws increasing the number of directors to four in the annual meeting of the shareholders on March 13, 1957, was a nullity; (3) That if such action was a nullity the alleged amendment left nothing which could be the subject of revival by conduct or

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive group.

therwise, and (4) That attendance of Claassen and Schwaln at three Directors' Meetings subsequent to the shareholders meeting which approximately one year did not operate to amend the by-laws changing the number of directors from three to four.

The Illinois Business Corporation Act (Sec. 25, Chap. 32, Ill. Rev. Stat.) provides that the power to amend the by-laws is "vested in the Board of Directors" unless reserved to the shareholders in the Articles of Incorporation. The power to amend the by-laws of Television Laboratories, Inc., was not reserved to the shareholders and therefore in the instant case this power would rest with the directors.

While this Court has had this appeal under advisement, appellants and appellees both have requested leave to cite an additional authority which we have granted. Appellants have cited *Comiskey v. CBC Corporation*, 26 Ill. App. 2d 330, 168 N. E. 2d 70. Appellees have cited to us the recent Supreme Court decision of *Cidwitz v. Luzzio Corrugated Box Co.*, 20 Ill. 2d 218, 170 N. E. 2d 131. Neither the appellants nor the appellees have cited to us any decision directly in point and to that extent this is a case of first impression. We might state, however, that we believe the case most closely in point not in exact facts but from a standpoint of rationale and principle is the *Comiskey* case, *supra*.

In *Comiskey v. CBC Corporation*, *supra*, it was held that



a director of a corporation was estopped by his conduct from questioning the validity of acts of the board or the status of a director elected at a special meeting as a member of the board. His conduct consisted of presiding at a meeting of the board, voting for by-laws insuring to his benefit and accepting an increase in salary voted by the board, without objecting to the presence and participation of an additional director elected at a special meeting. It was further held that any right which the director might have had to question the validity of the amendment to the by-laws of the corporation increasing the number of directors from four to five was waived by his participation at the meeting of the board at which meeting the by-law in question was adopted when he, as Vice-President, presided and submitted the proposed amendment to the board even though he voted against the amendment.

In *Gidwitz v. Lenzit Corrugated Box Co.*, supra, stock of a closely held corporation was split 50-50 between two families the president of the corporation used his position to completely control and manage the corporation without majority stock support so that members of the other family were effectively deprived of their rights and privileges and there were indications of a continuing course of conduct on the part of the president and members of his family to hold the corporate entity to complete exclusion of the other family so that they

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were deprived of their effective power as directors and officers of the corporation and the evidence indicated little or no hope for future improvement. One of the oppressive acts relied on was that there had been a ten year dead-lock caused by the president and his family refusing to increase the number of directors from four to five. The court held this to be oppression within the meaning of the Statute on the other fact sufficient to warrant dissolution.

Appellées argue from the ruling in the Gidwitz case supra., that if it is oppression to refuse to change the number of directors so that the majority stockholders can control, the allowance of Schwalm's contention that there should be 10 directors in the instant case would place him in a position to cause oppression leading to dissolution of Television Laboratories, Inc. With this contention and argument we cannot agree and we cannot anticipate what course of action the directors of Television Laboratories, Inc., might take in the future. We do not believe the Gidwitz case supra. is in point and helpful for a determination of the cause now before us.

Two Illinois Supreme Court decisions recognize adoption of a by-law by conduct in a situation where the stockholders and officers are identical and where all persons interested in the company were present. *Manufacturers' Exhibition Building Company v. Landay*, 219 Ill. 168, 76 N. E. 146; *People ex rel.*

Company v. [illegible] 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Wallace v. Sterling, 82 Ill. 457. In the Manufacturers' case, supra., the court held that a resolution abolishing the salary of a Vice-President of a corporation, adopted by the Board of Directors as an amendment to a by-law, was binding even though it was not ratified by the stockholders, who were the same persons who comprised the Board of Directors, even though one of the by-laws of the corporation made such ratification by the stockholders essential to the adoption of any amendment adopted by the directors.

In the Sterling case, supra., the charter of the corporation provided that the corporate powers be exercised by a Board of Directors who may adopt by-laws and the court held that a by-law adopted at the first meeting of the stockholders, all of whom were present and participated therein, and who were the only persons interested in the company either as directors, officers or stockholders, was binding notwithstanding that they designated themselves stockholders instead of directors. We cannot agree with the trial court's conclusion that V. E. Mertz, who was not present at the shareholders' meeting, was a director at the time of the March 13, 1957, annual shareholders' meeting. He had previously tendered his resignation, which was accepted on February 15, 1957, "effective with the annual shareholders' meeting to be held in March." Therefore, his resignation became effective with the opening of the



shareholders' meeting of March 13, 1957, and therefore all of the then directors, being Schwalm and Classen, participated in the shareholders' meeting in dispute. In fact, all of the parties interested in Television Laboratories, Inc., as shareholders, officers and directors, were present at the annual shareholders' meeting held on March 13, 1957, except the holders of 40 shares of stock. At the time of this meeting there were outstanding 800 shares of stock of the corporation and the holders of 760 shares were represented and participated in the meeting.

The power to amend the by-laws of Television Laboratories, Inc., not having been reserved to the shareholders, it is clear that the action of the shareholders at their annual meeting of March 13, 1957, amending the by-laws to provide for four directors instead of three was not in compliance with Section 25 of the Illinois Business Corporation Act, supra. The question then is whether or not the alleged four directors elected at the annual shareholders' meeting on March 13, 1957, by their subsequent conduct did adopt by their acts and apparent intent the by-law amendment passed by the shareholders? Has Classen ratified and acquiesced in the by-law change to an extent that he is estopped to challenge its validity? We think that both questions must be answered in the affirmative. Classen himself as President sent to all shareholders a notice that at the

March 13, 1957, meeting of the shareholders there would be for consideration the proposition of an amendment to the by-laws increasing the number of directors from three to four. At the meeting when the question was discussed a stockholder by the name of Lyons stated that he would be for the proposal and Classen asked if he, Lyons would put it in the form of a motion. Lyons then moved that the by-laws be changed so that the number of directors be increased from three to four. This motion was seconded by Pierce and adopted without any negative vote. There is a dispute whether Classen remained silent or whether he voted in favor of the proposition. The minutes of the shareholders' meeting indicate that the resolution was unanimously approved by the stockholders present. Since Classen was a stockholder it can be presumed that he voted for the proposition, but in any event, it is absolutely clear that he did not vote against the increase and did not object or in any way oppose the increase of the Board of Directors from three to four. After this alleged amendment of the by-laws, the shareholders then proceeded to elect four directors. There is nothing to indicate that Classen objected to the election of the four, he did not vote against the election of the four directors and in no way opposed it. Immediately after the election of the four directors, the four of them held the annual meeting of the Board of Directors. At this meeting

Classen did not object or in any way oppose the participation of all four.

On August 26, 1957, the same four directors met in a regular meeting and among other business declared a dividend of \$100.00 per share. Classen again did not object or in any way oppose the participation of all four persons and further testified the dividend so declared was received by him in the form of a check and cashed. The four alleged directors again met on March 26, 1958, and among other business transacted again declared a dividend of \$200.00 per share. At this meeting, there is no indication in the record that Classen objected or in any way opposed the participation of all four persons as directors, and for the second time he received his dividend check and cashed same.

One item of evidence that is most significant in the determination that Classen assumed all four persons were legally qualified and participating as directors, was his memo of March 27, 1958, to the treasurer directing him to pay \$50.00 "to each of the four directors in attendance at this meeting." Classen urges that the one year period from March, 1957, to March, 1958, is too short a time to indicate that the directors adopted the shareholders' resolution by acquiescence. It is not the mere passage of time alone that is relevant, but rather what is significant is the intent of the parties. If

It is not the mere passage of time that is important
rather what is significant is the fact that the
directors advised the shareholders that the company
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the time is long, intent is presumed, however, in the instant case there need not be any presumption of intent for it is positively established by the conduct of the four directors involved. The four directors, by holding meetings, electing officers, declaring dividends, cashing of dividend checks, by the payment of compensation to all four directors by their acts, by their conduct and by their obvious intent, adopted as their own act and ratified as their own agreement the by-law's amendment of the shareholders of March 13, 1957. We, therefore, conclude that four directors legally comprise the Board of Directors of Television Laboratories, Inc.

We, having concluded that the by-laws of Television Laboratories, Inc., were properly amended by the acts, conduct and intent of the directors subsequent to the March, 1957, shareholders' meeting, thereby increasing the number of directors from three to four, we now turn our attention to the March, 1958 shareholders' meeting and Directors' Meeting. At the March, 1958, shareholders' meeting, Schwalm, Blasted, Pierce and Mrs. Ruth E. Schwalm, all four received votes as directors and since four were to be elected, we conclude that all four were properly elected and are now directors of Television Laboratories, Inc. At the annual shareholders' meeting of March, 1958, the shareholders purported to rescind the by-law amendment adopted by them in 1957 and to fix the

number of directors at three. Since this is the province of the Board of Directors, such action was invalid and we have a different situation at the 1958 meeting as contrasted to 1957. At the 1958 shareholders meeting, Schwalz objected to the purported amendment and he and his wife voted against it. Whereas, at the 1957 annual shareholders meeting, no objection was raised to the shareholders amending the by-laws. At the annual Directors meeting of April 17, 1958, Classen, Pierce and Schwalz were present and Classen proposed to amend Article III, Section 1 of the by-laws to fix the number of directors at three. Classen and Pierce voted in favor of it and Schwalz against it. Since we have previously concluded that there were in fact four directors, this proposed resolution failed to pass since it received but two favorable votes instead of the three necessary for a by-law amendment, which would have to be a majority of the four person board.

In the original Cook County action the City National Bank & Trust Company of Chicago and the Wauconda National Bank of Wauconda, Illinois, were named defendants and the trial court entered judgment in favor of both of the defendant banks. The charges against both banks were essentially hypothetical and failed to contain substantial averments of facts necessary to state a cause of action and the trial court properly entered judgment in favor of both banks.

Therefore, for the reasons herein stated, the decree entered in Cause No. 68878 is reversed and is remanded, with directions to dismiss for want of equity the complaint of Television Laboratories, Inc., an Illinois Corporation, Edward F. Classen and John E. Pierce.

The decree in Cause No. 68606 is reversed, in part, and remanded with directions to the trial court to enter a decree upon the complaint of Walter A. Schwalm and Ruth E. Schwalm in the following respects:

1. The court declare that Article III, Section 1 of the by-laws of Television Laboratories, Inc., requires the election of four directors.
2. The court declare invalid the purported resolution of the shareholders of March 26, 1958, regarding the amendment of Article III, Section 1 of the by-laws adopted at the previous annual meeting of the shareholders.
3. The court declare that Ruth E. Schwalm was elected a director at the annual meeting of the shareholders on March 26, 1958.
4. The court declare invalid the purported resolutions of the Board of Directors adopted at the meeting of April 17, 1958.
5. The court enter judgment in favor of Walter A. Schwalm and against Television Laboratories, Inc., for Twelve Thousand Five Hundred Dollars (\$12,500.00), the salary accrued to him from April 19, 1958, to September 19, 1958, and declare his right to salary in the future at the rate of Thirty Thousand Dollars (\$30,000.00) per year until such annual salary is lawfully increased, diminished or stopped by proper action of the Board of Directors.

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The decree in cause No. 169606 is affirmed as to the City National Bank and Trust Company of Chicago, Illinois, and the Wauconda National Bank of Wauconda, Illinois, and as to all other matters not specified above.

The decree entered in cause No. 68878 reversed and remanded with directions; the decree entered in cause No. 169606 affirmed in part and reversed in part and remanded with directions.

Justice Olvey took no part in this opinion.

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MARGARET KRUGER ROHRER,

Plaintiff - Appellant

v.

ROSS JAY ROHRER, FIRST SECURITIES
 COMPANY OF CHICAGO, a corporation,
 DIVERSIFIED INVESTMENT FUND, a
 corporation, and FUNDAMENTAL INVEST-
 ORS, a corporation,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This action, by a wife, seeks judgment declaring that she is owner of one-half of shares of stock purchased in the names of her husband and herself. The court's judgment declared that she had no right, title or interest in the stock. She has appealed.

Plaintiff and defendant were married in June 1937. They lived in Illinois until 1950 or 1951 and then moved to Mexico where they lived for four years. She then left Mexico with their elder son, Jeremy, and established residence in Pennsylvania. The other son, Geoffrey, stayed in Mexico with defendant.

On June 15, 1955 plaintiff and defendant made a contract in Pennsylvania under which she was to have custody of both children and to receive \$300 per month for their support until September 1956 when Jeremy would "enter college", and an adjustment of support payments would be then made. Defendant, in addition, among other things, agreed to pay all medical and dental expenses, and to allow \$500 for boys' clothing. Two

blocks of stock, Fundamental Investors and Diversified Investment Fund, "now held jointly" were to be so held until September 1956 in order that plaintiff might have the income "as part of the support money" and then were to be placed in defendant's name as "sole owner." The contract concluded with this paragraph: "For the above consideration, Margaret Kruger Rohrer agrees not to contest any action for divorce nor make any further claim on Ross Jay Rohrer."

The parties contemplated a divorce action by defendant in Mexico. He did not file the action. Plaintiff, in October 1957, obtained a divorce in Pennsylvania. She refused to transfer the Fundamental Investors and Diversified Investment Fund stock in accordance with the contract and defendant met her in New York City January 7th for discussion.

After the New York meeting, plaintiff wrote defendant January 8, 1958 enclosing "all the stock certificates which I had . . . and signed stock powers to cover" Defendant forwarded the certificates and "powers" to the First Securities Company of Chicago, holder of the joint account, and this company paid him the accrued dividends in the account.

On January 28th plaintiff wrote the First Securities Company to continue holding the stocks and dividends in the joint account saying that she "had not and would not sign any stock powers." Thereafter, at the company's request, defendant returned the money paid, and the money and securities are now held by that company.

The issues made by the pleadings were: a) whether the stock was purchased from funds to which each contributed

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equally, with the understanding that in event of sale the proceeds would be divided equally, or whether defendant had purchased the stock with his own funds and was sole owner entitled to possession by virtue of the 1955 contract and the New York transaction in 1958; and b) whether the 1955 contract was abandoned by defendant's failure to perform.

The court found that the contract of June 1955 was void under the laws of Pennsylvania; that the parties on January 8, 1958 made an agreement under which defendant became the sole and exclusive owner of the stock; and that this agreement was not impaired by the void contract of June 15, 1955.

We agree with the trial court that the written contract made by the parties in Pennsylvania in June 1955 is void. Because the instant suit is brought in this state, the law of Illinois, as the forum state, determines what law governs the validity of the contract. RESTATEMENT (SECOND), CONFLICT OF LAWS § 7 (1958). Under the Illinois rule the validity of the contract is determined by Pennsylvania law because the contract contemplated performance in several states--a Mexican divorce, a stock transfer in Illinois and receipt of payments by plaintiff in Pennsylvania. Oakes v. Chicago Fire Brick Co., 388 Ill. 474 (1944).

There is no merit in defendant's claim that under Pennsylvania law the contract was not void as against public policy. He relies upon Burkholder's Appeal, 105 Pa. 31 (1884), and In re Frank's Estate, 195 Pa. 26, 45 Atl. 489 (1900). The Burkholder case, decided in 1884, involved an agreement to save a marriage, not to destroy one. The court said no question

had been raised about the provision for a possible subsequent separation. The court went on to say, nevertheless, that "if . . . we concede it to be against public policy" it does not affect the case, and that no attempt had been made to enforce the contract and "none could have been made". In In re Frank's Estate, decided in 1900, no question was raised about the invalidity of the contract. A first wife, twenty-six years after the separation agreement, was seeking to recover the widow's share of a decedent's estate.

We think the more recent In re Shannon's Estate, 289 Pa. 280, 137 Atl. 251 (1927) settles the point for us. The contract is against the public policy of Pennsylvania because plaintiff agreed not to contest defendant's proposed suit for divorce.

We disagree with defendant's contention that the illegal portion of the 1955 agreement is separable from the rest. In its final paragraph it states: "For the above consideration Mary Kruger Rohrer agrees not to contest any action for divorce" We think the divorce was the essential purpose of the agreement. The inference is plain that the agreement would not have been made had not divorce been contemplated. The Supreme Court of Pennsylvania in In re Shannon's Estate found that the consideration was "the nominal one of \$1.00 and 'other considerations of the agreement,'" one of which was that the husband should start proceedings for divorce which the wife would not defend. The court decided that the consideration for this contract was indivisible and held that the contract was void. We conclude that under Pennsylvania law the entire 1955 agreement is void as against the public

policy of that state.

The decisive question is on the trial court's decretal finding that the parties made the agreement in January 1958 under which defendant became "the sole and exclusive owner of the stock."

The theory of plaintiff's complaint is that the stock was bought with joint funds, issued in the joint names and held by plaintiff with the understanding that each owned a half interest in the stock or in the proceeds of any sale. Defendant's theory was that he was sole owner because he alone furnished the purchase price and that the stock was issued in names of both as a convenience. At the trial and in this court he has consistently contended for the validity of the 1955 contract and treated the January 1958 transaction as simply the performance of that contract by plaintiff.

Plaintiff's testimony is consistent with her theory. She testified as to the conversation in New York in January 1958: "We were going to divide the stocks but in addition to that he was going to give me a check for \$1700 for child support." In her letter next day she wrote:

"I am enclosing several things. Some clippings from the paper which I thought might interest you--all the stock certificates which I had (the balance are at First Securities) and signed stock powers to cover.

If this doesn't indicate complete trust in you, I don't know what would!

What you do now--how much you send me, if anything at all, let your heart dictate."

She testified this referred to a check he said he would

send to reimburse her for \$1700 she had spent on the children. She said she did not have in mind turning the stock over to him letting him decide whether he would give her "anything." The "anything", she said, had reference "only" to the reimbursement and "had nothing to do with the stocks whatsoever . . . it is a separate thing entirely. . . I trusted him to sell the stocks" and to give "whatever his heart dictated," in addition "from his portion of the proceeds." She said he agreed that he owed her \$1700 for the reimbursement and that he was to give her "in addition this cash from his portion of the proceeds." She then testified he said he would sell the stock "and give me half." She said she did not know at the time how much he owed her under the June 1955 agreement. She had no recollection of the monthly payments being reduced after September 1956.

The defendant testified that to the best of his knowledge he made payments under the 1955 contract and that in September of 1956 the parties orally agreed to reduce the monthly payments to \$200. He said that in March 1957 he was not employed and asked for the stocks so that he could get cash to pay her.

He testified that at the January 1958 meeting she claimed "a couple thousand dollars" and that he convinced her he owed only for 2½ or 3 months but that he told her since she was getting \$100 a month from the stocks that he owed her only "\$300 or \$700." He said it was not \$1700.

We think that the finding that there was an agreement made in New York in January 1958 between the parties which was effective to transfer plaintiff's interest in this stock to defendant is against the manifest weight of evidence. The

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evidence clearly does not disclose a meeting of the minds. We glean from the testimony that plaintiff intended defendant to reimburse her for monies she had expended on the children and in addition pay her half the proceeds of the sale of the stock. It is apparent that defendant, on the assumption that he was sole owner of the stock, intended to claim possession of the stock under the June 1955 agreement and to pay whatever monies he owed that were due under that agreement. The oral opinion of the trial court is not definitive about the terms of the "agreement" in New York or about what the minds of the parties met upon.

We think that the trial court erred in deciding that the testimony of the parties, relating to their New York meeting, proved an agreement under which plaintiff promised to transfer her interest in the stock in consideration of plaintiff's promise to pay her "between three and four hundred dollars." The record shows that this is a case in which an opposite conclusion to that of the trial court's decision is clearly evident. See In re Estate of Meade, 17 Ill. 2d 286 (1958).

For that reason the judgment is reversed and the cause is remanded with directions to retry the issues presented with respect to what transpired at the New York meeting between the parties in January 1958.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURMAN and MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

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(b) any operation on... the female generative organs unless at least six months have elapsed since the effective date of such family member's coverage...."

In support of her verdict, plaintiff's main argument is that what this clause intends to exclude is a question of fact; it is meant to exclude "elective" operations rather than "emergency" operations such as this one. By "elective" operations plaintiff refers to surgery to remedy a condition existing prior to the policy date and of such nature that the patient may wait to have it corrected. This intent may or may not have existed, but this is immaterial; no such distinction is found in the clause itself from which we must discover the intent of the parties. Further, clause (a), which we have quoted, does exempt these "elective" operations. To give clause (b) the interpretation which plaintiff wishes would render it meaningless in view of clause (a). An insurance contract should be construed in its entirety and in such a manner as to give effect to all of its provisions, if possible. *Fogelmark v. Western Casualty & Surety Co.*, 11 Ill. App. 2d 551; *Sindelar v. Liberty Mutual Ins. Co.*, 161 F.2d 712 (C. C. A. 7), cert. den. 332 U.S. 773.

Plaintiff, her physician, and her daughter, were the only witnesses at the trial. The policy was issued on April 15, 1958, and plaintiff was operated on in June of the same year which places the loss of plaintiff within the six months exclusion as provided in the policy. The testimony is uncontroverted and the question is one of law; i. e. whether there is any evidence to prove that the operation performed on plaintiff was not on the female generative organs.

Prior to plaintiff's confinement in the hospital, she suffered a fall in her home on May 22, 1958, with consequent vaginal bleeding. Her physician testified that the main problem for which surgery was to be performed was to stop the bleeding and during the course of the surgery

he removed the cystocele and rectocele. A cystocele is a protrusion of the bladder into the vagina; a rectocele is a protrusion of the rectum into the vagina, and a male can have neither. He described the operation as a total vaginal hysterectomy based on the fact that plaintiff had a previous operation leaving only the cervix remaining and that is the part he removed in the operation. The cervix, he said, "is a portion of the female generative organs and is not found in the male. "

The question of law presented to the trial court upon a motion, at the close of all the evidence, is whether when all the evidence is considered, together with all reasonable inferences from it in its most favorable aspect to the party against whom the motion is directed, there is a total failure to prove a necessary element of the case. *Nelson v. Stutz Chicago Factory Branch*, 341 Ill. 387.

If no evidence was introduced to prove the allegations of the complaint, or, if only a bare scintilla of evidence has been adduced by the plaintiff, the court should allow the motion for a directed verdict. *Shevlin v. Jackson*, 5 Ill. 2d 43.

After a careful study of the evidence favorable to plaintiff, we think the trial court erred in drawing any inference in favor of plaintiff that the operation was not performed on her female generative organs. Plaintiff's insurance policy does not cover an operation on the female organs when it occurs within six months after the policy was issued as in this case. *Domino v. National Casualty Co.*, 321 Ill. App. 305.

For these reasons, we hold that the trial judge should have directed a verdict for the defendant. We therefore reverse the judgment and enter judgment here in favor of defendant.

The judgment of the Municipal Court of Chicago is, therefor,
hereby reversed.

REVERSED AND JUDGMENT
ENTERED HERE FOR
DEFENDANT.

KILEY, P. J. AND MURPHY J. CONCUR

ABSTRACT ONLY.

48179

LAURA EDNA MILES,

Appellant,

v.

CHICAGO TRANSIT AUTHORITY.

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

2012331

MR. JUSTICE FRIEND delivered the opinion of the court:

Plaintiff sued to recover damages for personal injuries alleged to have been sustained when a bus in which she was riding as a passenger for hire, owned and operated by defendant, struck a light pole inside the curb on Western Avenue near 21st Street in Chicago. Plaintiff was the only witness at the trial. At the close of her evidence the court directed a verdict for defendant and entered judgment thereon, from which plaintiff appeals.

It appears that plaintiff had for several years been employed as a maid at one of the concessions at Riverview Park in Chicago, working a six-day week and earning \$6.80 a day on a 1:00 to 10:00 p.m. shift. After finishing her work on July 4, 1956 she proceeded home by bus. She testified that her southbound bus, shortly before reaching 21st Street on Western Avenue, hit a pole; as a result her head was thrown back with a jerk, and her knee "went down." She experienced considerable pain, especially in her shoulder, and suffered a recurrence of a rectal condition; the next day she consulted a doctor. Thereafter, until August 14, 1956, she visited him

several times a week, had X-rays taken, and took the medication he prescribed. She paid the doctor at each visit, and also sustained expenses for the prescriptions which he ordered and had sent to her from a pharmacist.

Cross-examination was directed principally toward injuries sustained in two other accidents for which plaintiff had sued. Her suit against Maddox was based on a fall down a flight of unlighted stairs, on November 20, 1955, in a building owned by Mr. and Mrs. Maddox; that accident, plaintiff stated, caused rectal bleeding which continued for some time but which had cleared up before the accident involved in this proceeding. At the same time that this CTA suit was being tried, plaintiff had a suit pending against the Yellow Cab Company based on an accident which occurred June 17, 1957. Defendant's strategy in the instant proceeding was to characterize plaintiff as a litigious party and to suggest that the injuries of which she here complains were not caused by the bus accident but by the other accidents which she had also made the basis of legal proceedings. Defendant contends that plaintiff failed to prove that she suffered any injuries due to the incident on the bus; that the injuries for which she received medical attention between July 5, 1956 and August 14, 1956 were due to the building accident and the cab accident.

The abstract of record filed herein is scant, and accordingly we have carefully read the entire record. In the course of her examination and cross-examination plaintiff admitted that the most serious after-effect of the bus accident



was the condition of rectal bleeding. However, she stated several times that this condition, which had first occurred as the result of her fall in the Maddox building, had cleared up before the date of the bus accident, that she had gone back to work with the doctor's permission, and that the bus accident reactivated the condition; she also stated that as a result of the bus accident she injured her shoulder and experienced considerable pain from the injury.

In her brief plaintiff seeks to invoke the doctrine of res ipsa loquitur. However, in her statement of claim she charged, and on trial sought to prove, that defendant so "carelessly, negligently and improperly operated said motor bus" at an excessive rate of speed and with inefficient brakes that it collided with a light pole. The doctrine "does not apply where there is evidence of specific negligence." *O'Rourke v. Field & Co.*, 307 Ill. 197, 200 (1923). On the evidence presented, which consisted solely of plaintiff's testimony, she made out a prima facie case of negligence. This was not controverted, nor could it be, inasmuch as the court directed a verdict in favor of defendant at the close of plaintiff's case. Defendant's contention that plaintiff failed "to make any proof whatsoever that she suffered any injuries due to the incident upon the bus," is not supported by the record. Immediately following the accident, plaintiff for the first time experienced pain in her shoulder; and while it may be true, as she testified, that the Maddox accident precipitated her rectal

condition and that the cab accident reactivated it, she stated and repeated several times in the course of her testimony here that the bus accident also reactivated the rectal injury and that solely because of the bus injury she was put to the expense of additional medical treatment and prevented from pursuing her employment for approximately five to six weeks. Upon this state of the record the court should not have directed a verdict. Without a directed verdict the case would have been fully tried; plaintiff would have presented her version of the accident, defendant would have made its defense, and it would then have become the function of the jury, under proper instruction, to weigh the credibility of the witnesses, assess the value of the testimony, and decide the question of negligence and the nature and extent of damages, if any, resulting from the alleged accident here under consideration.

Accordingly, the judgment of the Municipal Court is reversed, and the cause remanded for a new trial.

Judgment reversed, and cause remanded
for a new trial.

BRYANT, J. concurs.,
BURKE, P.J. took no part.

CHICAGO BANK
APR - 4 1961
ASSOCIATION

APPEAL FROM SUPERIOR COURT,
COOK COUNTY

251 A^{2d} 3232

Defendant filed his verified answer and attached thereto numerous exhibits. This answer was stricken, and defendant thereafter filed a verified amended answer wherein

he denied that plaintiff was the sole owner of the business and averred that it was owned by plaintiff and her husband; denied that plaintiff retained him and paid him \$85.00 attorney's fee but averred that he received the fee from plaintiff and her husband, both of whom retained him; denied that he failed or refused to turn over the \$2500.00 to plaintiff or otherwise retained the said money, but averred that he gave plaintiff's husband a cashier's check for \$1500.00, payable jointly to plaintiff and her husband, who requested said funds on his own behalf and that of plaintiff; denied that he withheld the balance of \$1000.00, but averred that he turned over a cashier's check for that sum to plaintiff, payable to her and her husband, jointly, and that neither of these checks was returned to defendant. Plaintiff filed a verified replication denying that she received the \$2500.00 personally or through any lawfully constituted agent.

In answer to written interrogatories submitted by defendant, plaintiff stated that she was the sole owner of the business, and that the liquor license was issued to her. She admitted that the bill of sale to the purchasers of the tavern and restaurant named her and her husband as the owners of the business, and that she and her husband were lessees of the premises under a written lease. She further admitted that her attorney has the \$1000.00 check in his possession.

Thereafter defendant filed his motion for summary judgment which was supported by his affidavit in which he represented that, if sworn as a witness, he could and would



testify competently to the facts therein stated. Neither a motion to strike nor a counteraffidavit was filed by plaintiff. Following the entry of the order sustaining defendant's motion for summary judgment, plaintiff filed a motion to vacate that order, and defendant filed his objections thereto. The motion was overruled, and no appeal was taken from that order.

The court was called upon to decide whether the business in question was owned solely by plaintiff, as she contended, or jointly by her and her husband. With respect to the ownership of the business, defendant's affidavit in support of his motion for summary judgment, which is undenied, alleged that on January 10, 1957 plaintiff and her husband purchased the goods and tavern fixtures mentioned in the bill of sale which, by reference, was made a part of the affidavit; that these goods and fixtures were, during all the time in question, on the premises leased by plaintiff and her husband as lessees; that subsequently, on December 17, 1957, plaintiff and her husband sold the tavern fixtures and chattels for \$2500.00, and together executed a bill of sale and a vendors' affidavit under the Bulk Sales Act (Ill. Rev. Stat. 1959, ch. 121-1/2, §§ 78 et seq.) to the new purchasers; that both plaintiff and her husband retained him when they sold the business, and that the \$85.00 fee for his services was paid jointly by them; that the purchase price of \$2500.00 was evidenced by checks which were made payable to plaintiff and her husband, jointly; that plaintiff and her husband endorsed these checks in blank and, pursuant to instructions from the buyers and with the consent

of plaintiff and her husband, defendant was instructed to retain the monies pending the issuance of a release from the State Sales Tax Department; that on January 10, 1958 defendant released \$1500.00 of said purchase price by surrendering a check in that amount to plaintiff's husband which was made payable to him and plaintiff, jointly; that thereafter, on February 21, 1958, at the request of plaintiff, defendant gave plaintiff a check for the balance of the purchase price, namely, \$1000.00, which was made payable to plaintiff and her husband, jointly; that thereafter plaintiff claimed that her husband forged her signature to the \$1500.00 check made payable to them jointly; that she subsequently recovered this sum through an interpleader suit; that plaintiff or her attorney has possession of the balance of the purchase price of \$1000.00 evidenced by check payable to them jointly; that plaintiff demands that defendant cancel the \$1000.00 check which was made payable to her and her husband, and issue in lieu thereof a check in the amount of \$1000.00 payable to plaintiff alone. Defendant stated that he is ready, willing, and able to do so, provided that he is indemnified from further litigation by the husband, by an adequate surety bond, which the plaintiff refuses to tender. It is contended that inasmuch as plaintiff recovered \$1500.00 of her alleged claim and has been given the balance of \$1000.00 by check payable to her and her husband, and inasmuch as the \$85.00 fee paid to defendant jointly by plaintiff and her husband for services in connection with the transaction is fair and reasonable, plaintiff has no claim against defendant for any

damages whatsoever. Lastly, defendant stated that none of the affirmative defenses set forth in his sworn amended answer have been denied, and that the complaint filed was not under oath.

The record must be studied both with respect to what is included and what omitted--the filing of defendant's uncontroverted affidavit, the absence of a motion by plaintiff to strike the affidavit, her failure to file a counteraffidavit, her admission of recovery of \$1500.00, and of the possession or control of the \$1000.00 check. On this record we think the court properly concluded that there was no genuine issue of fact to be determined by a jury, and properly sustained defendant's motion for summary judgment.

In her motion to vacate the order for summary judgment, plaintiff argues that the court erred because it considered in evidence a letter written by her attorney of record, addressed to defendant and his law partner, the pertinent portion of which reads as follows: "You are now holding \$1,000.00 of a total of \$2500.00, which, technically should be disbursed to Mr. & Mrs. Bushbaum, jointly, . . ." The court evidently considered this letter as an indication of the joint ownership of the business. In her motion plaintiff contends that the letter was written for purposes of "conciliation" and could have been explained as a mistake of law on the part of the writer. However, the letter was considered only in connection with plaintiff's motion to vacate the order for summary judgment.

From the foregoing considerations, we are of opinion that the court properly determined that no genuine issue of fact existed, and therefore the order for summary judgment is affirmed.

Order for summary judgment affirmed.

BURKE, P.J., and
BRYANT, J., concur.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10314

Agenda No. 12.

Homer Johnson, Administrator of the
Estate of Carl M. Johnson, Deceased,

Plaintiff-Appellant,

vs.

Earl T. Livesay,

Defendant-Appellee.

Appeal from the
Circuit Court of
Champaign County.

SUPPLEMENTAL OPINION AS MODIFIED BY COURT ON
ITS OWN MOTION.

REYNOLDS, J.

This is an appeal from a judgment of the Circuit Court of Champaign County which followed direction of a verdict in favor of the defendant and against Homer Johnson, administrator of the estate of Carl M. Johnson, deceased.

The action arose by reason of a suit filed by the administrator for damages occasioned by the death of Carl M. Johnson. The complaint was in two counts, Count I charging negligence of the defendant and Count II charging wilful and wanton acts or omissions on the part of the defendant. Count I alleged due care on the part of the decedent, but Count II failed to allege that the decedent was not guilty of wilful and wanton acts or omissions. Defendant did not raise any question as to the omissions

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This is an appeal from a judgment of the Court of Appeals for the Second Circuit, which affirmed the judgment of the District Court of the Southern District of New York, in the case of *United States v. Johnson*, 100-100000-100000.

The action arose by reason of a will filed by the testator, *United States v. Johnson*, 100-100000-100000. The complaint was in two counts, Count I charging negligence of the defendant and Count II charging willful and wanton acts or omissions on the part of the defendant. Count I alleged that the defendant was negligent, but Count II failed to allege that the defendant was not guilty of willful and wanton acts or omissions. Defendant did not raise any question as to the omissions.

in pleading in Count II and will be deemed to have waived it. At the conclusion of the testimony for the plaintiff, the trial court allowed motions for directed verdict for the defendant as to each count.

The automobile driven by the defendant, traveling westwardly on Philo Road, a two lane black top road, collided with the automobile driven by Carl M. Johnson southwardly on First Street Road at the intersection of the two roads. Philo Road was the preferred road, and had stop signs at the intersection, so that traffic entering Philo road from either the north or south was required to come to a stop before entering the intersection. These stop signs had been there for several years. There is evidence in the record by way of admission of the defendant that he was traveling 55 miles per hour, without lights. There is evidence that the time was about 5:00 o'clock in the afternoon, and that it was misty and foggy with a wet pavement, and that automobiles using the highways were using their lights. There is no direct evidence as to the conduct of the plaintiff's intestate immediately before and at the time of the collision, as to how he entered the intersection; that he stopped before entering the intersection or that he failed to stop. There is some evidence by way of inference that he failed to stop. There is some evidence that the defendant did not see any headlights of the Johnson car, but that Johnson could have had his parking lights on at the time of the collision. There is evidence showing that after the collision the defendant's automobile come to a stop approximately 75 feet west and 25 feet south of the intersection and that the Johnson automobile was approximately 40 feet west and

in pleading in Count II and will be deemed to have waived it. As the conclusion of the testimony for the plaintiff, and trial court allowed motions for directed verdict for the defendant as to each count.

The automobile driven by the defendant, traveling westerly on Philo Road, a two lane black top road, collided with the automobile driven by Carl L. Johnson southerly on Third Street Road at the intersection of the two roads. Philo Road was the preferred road, and had stop signs at the intersection, as that traffic entered Philo Road from either the north or south was required to come to a stop before entering the intersection. Those stop signs had been there for several years. There is evidence in the record by way of admission of the defendant that he was traveling 25 miles per hour, without lights. There is evidence that the time was about 5:00 o'clock in the afternoon, and that it was dark and foggy with a wet pavement, and that automobiles using the highway were using their lights. There is no direct evidence as to the conduct of the plaintiff's insurance immediately before and at the time of the collision, as to how he entered the intersection, that he stopped before entering the intersection or that he failed to stop. There is some evidence by way of inference that he failed to stop. There is some evidence that the defendant did not see any headlights of the Johnson car, but that Johnson could have had his parking lights on at the time of the collision. There is evidence showing that after the collision the defendant's automobile came to a stop approximately 75 feet west and 25 feet south of the intersection and that the Johnson automobile was approximately 50 feet west and

12 feet south of the intersection. Pictures introduced showed the defendant's car badly damaged on the right side and the Johnson car damaged on the left front. Johnson was severely injured and died within a few hours. There was a passenger riding with the defendant, but the record does not disclose whether he was killed, injured or escaped injury.

The evidence as to the speed and that the defendant was driving without lights, was admitted as an admission against interest by the defendant, the mother and father of Carl M. Johnson testifying that the defendant admitted to them that he was driving without lights; that he was driving at a speed of 55 miles per hours; that he saw the Johnson car and tried to speed up to get past and that he could not say positively that the Johnson car did not have any lights burning. These witnesses admitted that at the coroner's inquest defendant testified he did have his lights burning.

In allowing the motion for directed verdict as to Count I, the trial court held that there was no evidence before the court showing due care and caution on the part of the plaintiff's intestate. As to Count II the court does not comment on the lack of proof that the plaintiff's intestate was free from wilful and wanton acts or omissions, but the same rule that governs the negligence count would govern the wilful and wanton count, that is, that there was no evidence before the court showing plaintiff's intestate free from wilful and wanton conduct.

In this case there is sufficient evidence in the record to warrant the court to submit the case to the jury as to Count I

12 feet south of the intersection. Pictures introduced showed the defendant's car badly damaged on the right side and the Johnson car damaged on the left front. Johnson was severely injured and died within a few hours. There was a passenger riding with the defendant, but the record does not disclose whether he was killed, injured or escaped injury.

The evidence as to the speed and that the defendant was driving without lights, was admitted as an admission against interest by the defendant, the mother and father of Carl W. Johnson testifying that the defendant admitted to them that he was driving without lights; that he was driving at a speed of 25 miles per hour and that he saw the Johnson car and tried to speed up to get past and that he could not say positively that the Johnson car did not have any lights burning. These witnesses admitted that at the coroner's inquest defendant testified he did have his lights burning.

In allowing the motion for directed verdict as to Count I, the trial court held that there was no evidence before the court showing due care and caution on the part of the plaintiff's intestate.

As to Count II the court does not comment on the lack of proof that the plaintiff's intestate was free from willful and wanton acts or omissions, but the same rule that governs the negligence count would govern the willful and wanton count, that is, that there was no evidence before the court showing plaintiff's intestate free from willful and wanton conduct.

In this case there is sufficient evidence in the record to warrant the court to submit the case to the jury as to Count I

on the question of the defendant's negligence. The evidence of a misty and foggy condition, and the claimed admission of the defendant that he was driving in those weather conditions at a speed of 55 miles per hour without lights, raise a very definite question as to the negligence of the defendant. But, as previously stated, there is no direct evidence that the plaintiff's intestate acted with due care for his own safety. If there is any evidence that could or should be considered, it must be by inference.

In cases of this character as to Count I, the plaintiff must allege and prove that he was in the exercise of due care and caution for his own safety. It is true that there are certain presumptions that may be considered under certain conditions. Where one of the parties is killed, evidence of the habits and character of the deceased may be introduced, if there are no eyewitnesses. Here there was a possible eyewitness, the passenger in the defendant's automobile, but he was not called and there is no evidence that he saw the Johnson car before the collision. The plaintiff made no offer of habit evidence as to Carl M. Johnson, and the record is silent as to this eyewitness. Because there was an eyewitness, the presumption of the exercise of due care under the instinct of self-preservation would be barred, provided this passenger in the defendant's automobile was a competent eyewitness. The proper procedure would have been for the plaintiff to offer such evidence, and unless the defendant proffered an eyewitness, the testimony would have been admissible, but this was not done. Due care on the part of the plaintiff

on the question of the defendant's negligence. The evidence of a misty and foggy condition, and the claimed admission of the defendant that he was driving in those weather conditions at a speed of 25 miles per hour without lights, raise a very definite question as to the negligence of the defendant. But, as previously stated, there is no direct evidence that the plaintiff's negligence was the cause for his own safety. If there is any evidence that could or should be considered, it must be by inference.

In cases of this character as to Court 1, the plaintiff must allege and prove that he was in the exercise of due care and caution for his own safety. It is true that there are certain presumptions that may be considered under certain conditions, where one of the parties is killed, evidence of the habits and character of the deceased may be introduced, if there are no eyewitnesses. Here there was a possible eyewitness, the passenger in the defendant's automobile, but he was not called and there is no evidence that he saw the Johnson car before the collision. The plaintiff made no offer of habit evidence as to Earl M. Johnson, and the record is silent as to this eyewitness. Because there was an eyewitness, the presumption of the exercise of due care under the instinct of self-preservation would be barred, provided this passenger in the defendant's automobile was a competent eyewitness. The proper procedure would have been for the plaintiff to offer such evidence, and unless the defendant proffered an eyewitness, the testimony would have been admissible, but this was not done. Due care on the part of the plaintiff

cannot be presumed from the happening of the accident, the negligence of the defendant and the instinct of self-preservation; and in a death action there is neither a presumption that deceased unnecessarily exposed himself to danger, nor that he exercised due care by reason of the instinct of self-preservation. I. L. P. Vol. 28, Sec. 209. In this case none of these presumptions would be available if the passenger in the defendant's car was a competent eyewitness and had been proffered as an eyewitness upon the offer of testimony as to the careful habits of the deceased.

Liability may not be based upon imagination, speculation, or mere conjecture, and the question of its existence should be submitted for jury determination only where there is some direct evidence supporting each material allegation of the complaint or some circumstantial evidence from which inferences of such facts clearly preponderate. Tiffin v. The Great A. & P. Tea Co., 18 Ill. 2d 48, 60. Upon motion for a directed verdict for defendant, it is the duty of the trial court to determine whether there was any evidence, together with all reasonable inferences therefrom, tending to support the material allegations of the complaint. In the absence of such evidence, the trial court should grant the motion. Watts v. Bacon & Van Buskirk, 18 Ill. 2d 226. Where there is no evidence, direct or circumstantial, to prove plaintiff's exercise of due care for his own safety, the plaintiff failed to prove a material element in his case. Under such circumstances, the trial judge had no alternative when presented with a motion for directed verdict but to direct a verdict against the plaintiff on Count I

cannot be presumed from the happening of the accident, the negligence of the defendant and the finding of self-preservation; and in a death action there is, within a narrow scope, and deceased was necessarily exposed himself to danger, nor that he excluded his care by reason of the finding of self-preservation. Id., 111, 101, 28, 29, 30. In this case none of these presumptions could be available if the passenger, the defendant's car was a competent eyewitness and had been protected as an eyewitness with the other of testimony as to the mental habits of the deceased. Liability may not be based upon imputation, negligence, or mere conjecture, and the question of its existence should be submitted for jury determination only where there is some direct evidence supporting such inferred allegation of the conduct of some circumstantial evidence from which inference of such facts clearly preponderates. Wittin v. The Great A. & P. Tea Co., 111, 111, 24, 25, 26. Upon motion for a directed verdict for defendant, it is the duty of the trial court to determine whether there was any evidence, together with all reasonably inferable evidence, tending to support the material allegations of her complaint. In the absence of such evidence, the trial court should grant the motion. Watts v. Bacon & Van Buren, 111, 24, 25, 26. Where there is no evidence, direct or circumstantial, to prove defendant's negligence of due care for his own safety, the plaintiff is held to prove a material element in his case. Under such circumstances, the trial judge had no alternative when presented with a motion for directed verdict but to direct a verdict against the plaintiff on Count I

of his complaint. Rohr v. Cluver, 20 Ill. App. 2d 548,553. If upon the undisputed facts reasonable men exercising fair and honest judgment would be compelled to conclude that such facts failed to establish due care on the part of the plaintiff, or negligence on the part of the defendant, then these issues become questions of law. Wills v. Paul 24 Ill. App. 2d 417.

But our courts have zealously guarded the right of the plaintiff to have questions of fact as to due care or contributory negligence considered by a jury. They have held that the question of due care or contributory negligence on the part of the plaintiff become questions of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach a conclusion that there was contributory negligence. Pinkerton v. Oak Park Natl. Bank, 16 Ill. App. 2d 91; De Legge v. Karlsen, 17 Ill. App. 2d 69; Frunk v. Calumet City, 17 Ill. App. 2d 285; Hatcher v. New York Cent. R. Co., 25 Ill. App. 2d 193. To permit a court to hold that a plaintiff is guilty of contributory negligence as a matter of law, all reasonable minds must agree from the evidence with all reasonable inferences to be drawn therefrom in plaintiff's favor that the plaintiff is guilty of contributory negligence. It is an accepted maxim that anything short of that standard resolves itself into a question of fact solely within the province of the jury. Quigley v. Crawford, 19 Ill. App. 2d 454, 457.

Our courts have said many times that each case must rest upon its own facts and that no hard and fast rule can be laid down to

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will be the subject of a separate report. The results of the study will be published in the Journal of the American Medical Association.

457.

Two courts have said many times in the past that each must read the law on its own facts and that no hard and fast rule can be laid down to

govern each case. That is particularly true in this case. Here, there is some evidence that the defendant was traveling on a wet pavement, with visibility limited because of fog or mist, at a speed of 55 miles per hour without lights. This is sufficient evidence upon which a jury if it believed such evidence, could conclude that the defendant was guilty of negligence or wilful and wanton acts or omissions. It must be remembered that there is no evidence of contributory negligence on the part of the plaintiff's intestate, except the purported admission by the defendant to the parents of deceased, that he saw the Dodge car; that it was about the same distance from the intersection that he was and that he speeded up to get past. There is nothing in the record to show positively that the deceased driver did not make the stop, nothing to show the speed and the question of lights on the Dodge car is not clear. The sole question is not contributory negligence on the part of the decedent, but the lack of proof of due care, since the evidence of contributory negligence is not present. In other words, there is lack of direct evidence of due care, but little or no proof of contributory negligence. The trial court in granting the motions of the defendant for directed verdict on both counts of the complaint stated that there was no evidence of due care on the part of the plaintiff to submit to the jury.

Count I of the complaint charged negligence of the defendant. Count II charged the defendant with wilful and Wanton conduct. The trial court directed a verdict for the defendant on both counts. In Illinois, if the plaintiff's intestate proximately contributed

govern each case. That is particularly true in this case. Here, there is some evidence that the defendant was traveling on a wet pavement, with visibility limited because of fog or mist, at a speed of 55 miles per hour without lights. This is sufficient evidence upon which a jury is believed such evidence, could conclude that the defendant was guilty of negligence or willful and wanton acts or omissions. It must be remembered that there is no evidence of contributory negligence on the part of the plaintiff's intestate, except the purported admission by the defendant to the parents of deceased, that he saw the Godes car; that it was about the same distance from the intersection that he was and that he speeded up to get past. There is nothing in the record to show positively that the deceased driver did not make the stop, nothing to show the speed and the question of lights on the Godes car is not clear. The sole question is not contributory negligence on the part of the decedent, but the lack of proof of due care, since the evidence of contributory negligence is not present. In other words, there is lack of direct evidence of due care, but little or no proof of contributory negligence. The trial court in granting the motions of the defendant for directed verdict on both counts of the complaint stated that there was no evidence of due care on the part of the plaintiff to submit to the jury.

Count I of the complaint charged negligence of the defendant. Count II charged the defendant with willful and wanton conduct. The trial court directed a verdict for the defendant on both counts. In Illinois, if the plaintiff's intestate proximately contributed

to his injury or damage in any way, this constitutes contributory negligence and the plaintiff could not recover under Count I of his complaint.

If the plaintiff failed to prove freedom from willful and wanton acts or omissions on the part of his intestate, he could not recover under Count II of his complaint.

Here we have evidence that the pavement was wet; that it was foggy and misty and that the defendant was driving 55 miles per hour without lights; that he saw the car of the plaintiff's intestate and decided he couldn't stop and tried to speed up to pass. While it is true that the evidence also showed that the car of the decedent was about the same distance from the intersection, this was an estimate of the defendant and the jury was not bound to accept this testimony in its entirety but could evaluate such testimony. The defendant was not positive about the lights on the Johnson car, stating he saw no headlights but the parking lights could have been lighted. If the weather conditions were as testified, and the defendant was driving his car at 55 miles per hour without lights, it might have been impossible for the decedent to have seen the defendant's automobile at any time immediately prior to and at the time the decedent entered the intersection. The evidence as to the position of each automobile after the collision, the distance each traveled from the point of collision, the points of impact as to each automobile, all present questions of fact that properly could be considered by a jury.

After reviewing all the facts in evidence in this case, as to

to his injury or damage in any way, this constitutes contributory negligence and the plaintiff could not recover under Count 1 of his complaint.

If the plaintiff failed to prove freedom from willful and as such acts or omissions on the part of his opponent, he could not recover under Count 2 of his complaint.

Here we have evidence that the defendant was wrong; that it was wrong and that the defendant was driving at 25 miles per hour without lights; that he saw the car of the plaintiff in advance and should have stopped or slowed to avoid a collision. While it is true that the evidence also shows that the car of the defendant was about the same distance from the intersection, this was no excuse of the defendant for the jury was not bound to accept this position in the entire and could evaluate such testimony. The defendant was not entitled to the right of the Johnson car, seeing he saw no need to stop for the parking lights could have been right. If the defendant condition was as testified, and the defendant was driving his car at 25 miles per hour without lights, it might have been impossible for the defendant to have seen the defendant's automobile as early as immediately prior to and at the time the defendant entered the intersection. The evidence as to the position of each automobile after the collision, the distance each traveled from the point of collision, the points of impact as to each automobile, all present questions of fact that properly could be considered by a jury.

After reviewing all the facts in evidence in this case, as to

Count I, this court must conclude that the question of the exercise of due care on the part of the plaintiff was a question of fact for the jury. The same ruling would apply to the second count, namely the question of the absence of willful and wanton acts or omissions on the part of the plaintiff is a question of fact for the jury.

In so holding, this court recognizes that the evidence on the part of the plaintiff was weak on both counts. However, we do not believe, in view of the recent decisions on the question of proof, that there was a total lack of evidence on the part of the plaintiff tending to prove the material allegations of the complaint. We think there are inferences that could be drawn from the evidence that would justify the submission of the case to the jury, on both Counts I and II. There was a purported eyewitness. There is nothing in the record to show that he actually saw what happened or that he was a competent eyewitness that would bar testimony of prudent and careful habits on the part of the plaintiff's intestate. While the defendant was an incompetent witness in the case, this passenger in the defendant's car might have been a competent witness, and the jury was entitled to have his testimony, if it was competent. Our courts, our laws, our whole structure of legal proceedings are dedicated to one purpose, namely, to justice. Here a young man had borrowed the family automobile to go to Champaign to inquire about a scholarship at the University of Illinois, or to seek employment while attending the university. He lived on a farm with his parents and attended high school. From the evidence we may conclude that he was industrious and ambitious for his future. He is killed in an

Count I, this court must conclude that the question of the exercise of due care on the part of the plaintiff was a question for the jury. The same ruling would apply to the second count, namely the question of the absence of willful and wanton acts on the part of the defendant. Plaintiff is a question of fact in the case. In so holding, this court recognizes that the evidence on the part of the plaintiff was not a high enough standard, however, to do so. In view of the recent decision of the question of fact, believe that there was a total lack of evidence on the part of the plaintiff to prove the essential allegations of the complaint. We think there are inferences that could be drawn from the evidence that would justify the submission of the case to the jury, on both Counts I and II. There was a number of eyewitnesses, there is nothing in the record to show that he actually saw what happened or that he was a constant eyewitness that could not be taken into account. And careful habits on the part of the plaintiff's lawyer. While the defendant was an incompetent witness in the case, this testimony in the defendant's ear might have been a competent witness, and the jury was entitled to have his testimony, if it was competent. For courts, our laws, our whole structure of legal proceedings are based to one purpose, namely, to justice. Here a young man had borrowed the family automobile to go to Champaign to inquire about a scholarship at the University of Illinois, or to seek employment while attending the university. He lived on a farm with his parents and attended high school. From the evidence we may conclude that he was industrious and ambitious for his future. He is killed in an

accident with no eyewitnesses, except a passenger in the other automobile, who may or may not be a competent witness, and who may or may not be a hostile witness. Sooner or later, our courts may have to take cognizance of such a situation and permit evidence of care- and prudent habits of the person killed to be introduced, in order that justice may be served. In this case the matter of careful and prudent habits was not offered and is therefore not to be considered. This is not true of the presumption of the natural instinct of self-preservation, which may be presumed, since there is no proof that the passenger was a competent eyewitness and this presumption does not require evidence. We think, on the state of this record, that the jury was entitled to take into consideration the presumption of the instinct of self-preservation. It may well be, upon the entire record, the evidence may preponderate against the plaintiff and a verdict in his favor could not stand when tested by a motion for a new trial, but in this case, the evidence is such that it presents sufficient facts that would justify the submission of the case to the jury and we must hold that the trial court erred in granting the motion for directed verdict. In National Bank of Mattoon v. Hanley, 20 Ill. App. 2d 191, the guest was killed and there was no competent eyewitness. The court there held that the presumption that the deceased did everything necessary to prevent the loss of her life would come into play and could be considered by the jury. Here, so far as the record shows there was no competent eyewitness. The presumption of the instinct of self-preservation, in the absence of evidence of a competent eyewitness must be considered. If there

accident with no eyewitnesses, except a passerby in the other auto-
mobile, who may or may not be a competent witness, and who may or
may not be a hostile witness. Sooner or later, our courts may have
to take cognizance of such a situation and admit evidence of character
and present habits of the person alleged to be incompetent, in order
that justice may be served. In this case the matter of character and
present habits was not offered and its consideration must be disregarded.
This is not true of the presumption of the natural instinct of self-
preservation, which may be treated, since it is a fact, that
the defendant has a natural instinct of self-preservation does
not require evidence. He killed, he knew it, and he acted on this
instinct. The jury was entitled to take into consideration the presumption
of the instinct of self-preservation. To say, well, but, that the
evidence, the evidence may be considered against the defendant and
a verdict in his favor could not stand when based on a theory for
a new trial, but in this case, the evidence is such that it requires
sufficient facts that would justify the conviction of the case to
the jury and we must hold that the trial court acted in granting
the motion for a new trial. In National Bank of Assenon v.
Hulsey, 30 Ill. App. 2d 101, the facts were killed and there was no
competent eyewitness. The court there held that the presumption
that the deceased did everything necessary to prevent the loss of
her life would come into play and could be considered by the jury.
Here, so far as the record shows there was no competent eyewitness.
The presumption of the instinct of self-preservation, in the absence
of evidence of a competent eyewitness must be considered. If there

was a competent eyewitness his evidence should be put in the record. If he was not competent, then evidence of prudent and careful habits could have been admitted. It is true that no offer of such habits was made, but that does not change the view of this court as to the other evidence and presumptions. We still hold that there is sufficient evidence of negligence and willful and wanton acts and omissions on the part of the defendant, which coupled with the evidence of conditions, and the presumption of the instinct of self-preservation would require the submission of the case to a jury.

Reversed and remanded.

CARROLL, P.J. and ROETH, J., concur.

was a competent eyewitness his evidence should be as in the record. If he was not competent, then evidence of a witness in a civilly habit could have been admitted. It is true that no other or such habits was made, but this does not change the view of this case as to the other evidence and, nevertheless, it is held that there is sufficient evidence of negligence in the light of the evidence of the witness on the part of the defendant, this coupled with the evidence of conditions, and the conclusion of the finding of fact is necessary would require the admission of the case to a jury.

It is so held.

CARROLL, J. J. and ROSEN, J. J. concur.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10314

Agenda No. 12.

Homer Johnson, Administrator of the
Estate of Carl M. Johnson, Deceased,

Plaintiff-Appellant,

vs.

Earl T. Livesay,

Defendant-appellee.

Appeal from the
Circuit Court of
Champaign County.

REYNOLDS, J.

This is an appeal from a judgment of the circuit court of Champaign County which followed direction of a verdict in favor of the defendant and against Homer Johnson, administrator of the estate of Carl M. Johnson, deceased.

The action arose by reason of a suit filed by the administrator for damages occasioned by the death of Carl M. Johnson. The complaint was in two counts, Count I charging negligence of the defendant and Count II charging wilful and wanton acts

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or omissions on the part of the defendant. Count I alleged due care on the part of the decedent, but Count II failed to allege that the decedent was not guilty of wilful and wanton acts or omissions. Defendant did not raise any question as to the omission in pleading in Count II and will be deemed to have waived it. At the conclusion of the testimony for the plaintiff, the trial court allowed motions for directed verdict for the defendant as to each count.

The automobile driven by the defendant, traveling westwardly on Philo Road, a two lane black top road, collided with the automobile driven by Carl E. Johnson southwardly on First Street Road at the intersection of the two roads. Philo Road was the preferred road, and had stop signs at the intersection, so that traffic entering Philo Road from either the north or south was required to come to a stop before entering the intersection. These stop signs had been there for several years. There is evidence in the record by way of admission of the defendant that he was traveling 55 miles per hour, without lights. There is evidence that the time was about 5:00 o'clock in the afternoon, and that it was misty and foggy with a wet pavement, and that automobiles using the highways were using their lights.

3. The following information is available for the year ended 31/12/2014:

There is no direct evidence as to the conduct of the plaintiff's interstate immediately before and at the time of the collision, as to how he entered the intersection, that he stopped before entering the intersection or that he failed to stop. There is some evidence by way of inference that he failed to stop. There is some evidence that the defendant did not see any headlights of the Johnson car, but that Johnson could have had his parking lights on at the time of the collision. There is evidence showing that after the collision the defendant's automobile came to a stop approximately 75 feet west and 25 feet south of the intersection and that the Johnson automobile was approximately 40 feet west and 12 feet south of the intersection. Pictures introduced showed the defendant's car badly damaged on the right side and the Johnson car damaged on the left front. Johnson was severely injured and died within a few hours. There was a passenger riding with the defendant, but the record does not disclose whether he was killed, injured, or escaped injury.

The evidence as to the speed and that the defendant was driving without lights, was admitted as an admission against

Interest by the defendant, the mother and father of Carl M. Johnson testifying that the defendant admitted to them that he was driving without lights, was driving at a speed of 55 miles per hour, that he saw the Johnson car and tried to speed up to get past and that he could not say positively that the Johnson car did not have any lights burning. These witnesses admitted that at the coroner's inquest defendant testified he did have his lights burning.

In allowing the motion for directed verdict, the trial court held that there was no evidence before the court showing due care and caution on the part of the plaintiff's intestate. As to Count II the court does not comment on the lack of proof that the plaintiff's intestate was free of wilful and wanton acts or omissions, but the same rule that governs the negligence count would govern the wilful and wanton count.

In this case there is sufficient evidence in the record to warrant the court ^{to submit} ~~to submit~~ the case to the jury on the question of the defendant's negligence. The evidence of a misty and foggy condition, and the claimed admission of the defendant that he was driving in those weather conditions at

a speed of 55 miles per hour without lights, raise a very definite question as to the negligence of the defendant. But, as previously stated, there is no direct evidence that the plaintiff's intestate acted with due care for his own safety. If there is any evidence that could or should be considered, it must be by inference.

In cases of this character, the plaintiff must allege and prove that he was in the exercise of due care and caution for his own safety. It is true that there are certain presumptions that may be considered under certain conditions. Where one of the parties is killed, evidence of the habits and character of the deceased may be introduced, if there are no eyewitnesses. Here there was a possible eyewitness, the passenger in the defendant's automobile, but he was not called and there is no evidence that he saw the Johnson car before the collision. The plaintiff made no offer of habit evidence as to Carl M. Johnson, and the record is silent as to this eyewitness. Because there was an eyewitness, the presumption of the exercise of due care under the instinct of self-preservation would be barred, provided this passenger in the defendant's automobile

was a competent eyewitness. The proper procedure would have been for the plaintiff to offer such evidence, and unless the defendant proffered an eyewitness, the testimony would have been admissible. But this was not done. Due care on the part of the plaintiff cannot be presumed from the happening of the accident, the negligence of the defendant, and the instinct of self-preservation; and in a death action there is neither a presumption that deceased unnecessarily exposed himself to danger nor that he exercised due care by reason of the instinct of self-preservation. Illinois Law and Practice, Vol. 28, Section 209. In this case none of these presumptions would be available if the passenger in the defendant's car was a competent eyewitness and had been proffered as an eyewitness upon the offer of testimony as to the careful habits of the deceased.

Liability may not be based upon imagination, speculation, or mere conjecture, and the question of its existence should be submitted for jury determination only where there is some direct evidence supporting each material allegation of the complaint or some circumstantial evidence from which inferences of such facts clearly preponderate. Tiffin v. The Great N. & P. Tea Co.,

18 Ill. 2d 48, 60. Upon motion for a directed verdict for defendant, it is the duty of the trial court to determine whether there was any evidence, together with all reasonable inferences therefrom, tending to support the material allegations of the complaint. In the absence of such evidence, the trial court should grant the motion. Watts v. Bacon & Van Buskirk, 18 Ill. 2d 226. Where there is no evidence, direct or circumstantial, to prove plaintiff's exercise of due care for his own safety, the plaintiff failed to prove a material element in his case. Under such circumstances, the trial judge had no alternative when presented with a motion for directed verdict but to direct a verdict against the plaintiff on his complaint. Rohr v. Cluver, 20 Ill. App. 2d 548, 553. If upon the undisputed facts reasonable men exercising fair and honest judgment would be compelled to conclude that such facts failed to establish due care on the part of the plaintiff, or negligence on the part of the defendant, then these issues become questions of law. Wills v. Paul 24 Ill. App. 2d 417.

But, our courts have zealously guarded the right of the plaintiff to have questions of fact as to due care or contributory

negligence considered by a jury. They have held that the question of due care or contributory negligence on the part of the plaintiff become questions of law only, when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach a conclusion that there was contributory negligence. Pinkerton v. Oak Park Natl. Bank, 16 Ill. App. 2d 91; De Legge v. Karlson, 17 Ill. App. 2d 69; Frank v. Calumet City, 17 Ill. App. 2d 285; Hatcher v. New York Cent. R. Co., 25 Ill. App. 2d 193. To permit a court to hold that a plaintiff is guilty of contributory negligence as a matter of law, all reasonable minds must agree from the evidence with all reasonable inferences to be drawn therefrom in plaintiff's favor that the plaintiff is guilty of contributory negligence. It is an accepted maxim that anything short of that standard resolves itself into a question of fact solely within the province of the jury. Quigley v. Crawford, 19 Ill. App. 2d 454, 457.

Our courts have said many times that each case must rest upon its own facts and that no hard and fast rule can be laid down to govern each case. That is particularly true in this

case. Here there is some evidence that the defendant was traveling on a wet pavement, with visibility limited because of fog or mist, at a speed of 55 miles per hour without lights. This is sufficient evidence upon which a jury if it believed such evidence, could conclude that the defendant was guilty of negligence or wilful and wanton acts or omissions. It must be remembered that there is no evidence of contributory negligence on the part of the plaintiff's intestate, except the purported admission by the defendant to the parents of deceased, that he saw the Dodge car, that it was about the same distance from the intersection that he was, that he speeded up to get past. There is nothing in the record to show positively that the deceased driver did not make the stop, nothing to show speed, and the question of lights on the Dodge car is not clear. The sole question is not contributory negligence on the part of the decedent, but the lack of proof of due care, since the evidence of contributory negligence is not present. In other words, there is lack of direct evidence of due care, but little or no proof of contributory negligence. The trial court in granting the motions of the defendant for directed verdict on both counts of

[illegible]

the complaint stated that there was no evidence of due care on the part of the plaintiff to submit to the jury.

Our courts have held many times that neither the trial court nor the reviewing court has any right to weigh the evidence. The question before this court, based upon the evidence presented, is whether there is any evidence which with any legitimate inferences that may be reasonably drawn therefrom tends to show the exercise of due care on the part of the plaintiff's intestate. In considering this question, the claimed negligence or wilful and wanton acts and omissions of the defendant, where supported by evidence, must be taken into consideration.

Count I of the complaint charged negligence of the defendant. Count II charged the defendant with wilful and wanton conduct. The trial court directed a verdict for the defendant on both counts. In Illinois, if the plaintiff's decedent's negligence proximately contributed to his death, this constitutes contributory negligence and the plaintiff cannot recover. The doctrine of comparative negligence has been discussed from time to time, but no action has been taken by our courts or the legislature. Under either

the complaint stated that there was no evidence of due care on the part of the plaintiff to assist to the jury.

Our courts have held many times that neither the trial

court nor the reviewing court has any right to weigh the

evidence. The question before this court, based upon the

evidence presented, is whether there is any evidence which will

any legitimate inference that may be reasonably drawn there-

from tends to show the existence of due care on the part of the

plaintiff's negligence. In considering this question, the

claimed negligence or willful and wanton acts and omissions of

the defendant, where supported by evidence, must be taken into

consideration.

Count I of the complaint charged negligence of the defendant.

Count II charged the defendant with willful and wanton conduct.

The trial court directed a verdict for the defendant on both counts.

In Illinois, if the plaintiff's negligence is a proximate

contributed to his death, this constituted contributory negligence

and the plaintiff cannot recover. The doctrine of contributory

negligence has been discarded from time to time, but no action

has been taken by our courts on the Legislature. Under either

doctrine, our present one as to contributory negligence or that of comparative negligence, the basic rule would remain the same, namely, if there is any evidence, together with all reasonable inferences to be drawn therefrom, which tends to prove the material allegations of the complaint, the cause should be submitted to a jury and the trial court has no right to direct a verdict. Friesland v. City of Litchfield, 24 Ill. App. 2d 390; Huntlen v. Gottschalk, 31 Ill. App. 2d 163; Wills v. Paul, 24 Ill. App. 2d 417. Even where the facts are undisputed or admitted but where a difference of opinion as to the inference that maybe legitimately drawn from them exists, it is primarily for the jury to draw the inference. Denny v. Goldblatt Bros., Inc., 295 Ill. App. 325; Huntlen v. Gottschalk, 21 Ill. App. 2d 163. It is immaterial upon which side the evidence is introduced. Litchfield v. Iowa-Illinois Gas & Electric Co., 25 Ill. App. 2d 476.

Here we have evidence that the pavement was wet, that it was foggy and misty and that the defendant was driving 55 miles per hour without lights. That he saw the car or the plaintiff's intestate and decided he couldn't stop and tried to speed up to

pass. While it is true that the evidence also showed that the car of the decedent was about the same distance from the intersection, this was an estimate of the decedent and the jury was not bound to accept this testimony in its entirety but could evaluate such testimony. The defendant was not positive about the lights on the Johnson car, stating he saw no headlights but the parking lights could have been lighted. If the weather conditions were as testified, and the defendant was driving his car at 35 miles per hour without lights, it might have been impossible for the decedent to have seen the defendant's automobile at any time immediately prior to and at the time the decedent entered the intersection. The evidence as to the position of each automobile after the collision, the distance each traveled from the point of collision, the points of impact as to each automobile, all present questions of fact that properly could be considered by a jury.

After reviewing all the facts in evidence in this case, this court must conclude that the question of the exercise of due care on the part of the plaintiff was a question of fact for the jury. The same ruling would apply to the second count, namely

the question of the absence of wilful and wanton acts or omissions on the part of the plaintiff is a question of fact for the jury.

In so holding, this court recognizes that the evidence on the part of the plaintiff was weak on both counts. However, we do not believe, in view of the recent decisions on the question of proof, that there was a total lack of evidence on the part of the plaintiff tending to prove the material allegations of the complaint. To think there are inferences that could be drawn from the evidence that would justify the submission of the case to the jury. There was a purported eyewitness. There is nothing in the record to show that he actually saw what happened or that he was a competent eyewitness that would bear testimony of prudent and careful habits on the part of the plaintiff's intestate. While the defendant was an incompetent witness in the case, this passenger in the defendant's car might have been a competent witness, and the jury was entitled to have his testimony, if it was competent. Our courts, our laws, our whole structure of legal proceedings are dedicated to one purpose, namely, to do justice. Here a young man has borrowed the family

automobile to go to Champaign to inquire about a scholarship at the University of Illinois, or to seek employment while attending the university. He lived on a farm with his parents and attended high school. From the evidence we may conclude that he was industrious and ambitious for his future. He is killed in an accident with no eyewitnesses, except a passenger in the other automobile, who may or may not be a competent witness, and who may or may not be a hostile witness. Sooner or later, our courts may have to take cognizance of such a situation and permit evidence of careful and prudent habits of the person killed to be introduced, in order that justice may be served. This is not true of the presumption of the natural instinct of self-preservation, as presumption does not require evidence. We think, on the state of this record, that the jury was entitled to take into consideration the presumption of the instinct of self-preservation. It may well be, upon the entire record, the evidence may preponderate

...to go to Chicago to ... a
scholarship at the University of Illinois, on to work
employment with ... the university, he lived
on a farm with his parents and attended high school.
From the evidence we may conclude that ... was
industrious and ambitious for his future. He is
killed in an accident with no explanation, except a
passenger in the other automobile, who ... he may not
be a competent witness, and who may or may not be a
hostile witness. ... on later, our course may have
to take consideration of such a situation and permit
evidence of counsel and witness ... of the person
killed to be introduced, in order that justice may be
served. This is not true of the presentation of the
natural instinct of self-preservation, in presentation
does not require evidence, he thinks, on the state of
this record, that the jury was entitled to take into
consideration the presentation of the instinct of
self-preservation. It may well be, upon the entire
record, the evidence any prejudicial

against the plaintiff and a verdict in his favor could not stand when tested by a motion for a new trial, but in this case, the evidence is such that it presents sufficient facts that would justify the submission of the case to the jury and we must hold that the trial court erred in granting the motion for directed verdict. In National Bank of Nattoon v. Hanley, 20 Ill. App. 3d 191, the guest was killed and there was no competent eyewitness. The court there held that the presumption that the deceased did everything necessary to prevent the loss of her life would come into play and could be considered by the jury. Here, so far as the record shows there was no competent eyewitness. The presumption of the instinct of self-preservation, in the absence of evidence of a competent eyewitness must be considered. If there was a competent eyewitness his evidence should be put in the record. If he was not competent, then evidence of prudent and careful habits could have been admitted. It is true that no offer of such habits was made, but that does not change the view of this court as to the other evidence and presumptions. We still hold that there is sufficient evidence of negligence and willful and

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wanton acts and omissions on the part of the defendant, which coupled with the evidence of conditions, and the presumption of the instinct of self-preservation would require the submission of the case to a jury.

Reversed and remanded.

CARBOLL, P.J. and ROETH, J., concur.

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2741 4

Abstract

1st DIVISION

A

NO. 11493

Abstract

Agenda 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A.D. 1961

FLORA M. NEILSON,

Plaintiff-Appellant,

vs.

WILLIAM G. NEILSON,

Defendant-Appellee.

Appeal from the

City Court of

Kewanee

23 11 23 478

McNEAL, J. -

This is an appeal by the Plaintiff, Flora M. Neilson, from a decree of divorce entered by the City Court of Kewanee on September 7, 1959, nunc pro tunc as of May 1, 1959, and from orders entered by that court denying her motions filed on October 1, 1959, to vacate the decree and for a change of venue. Plaintiff originally filed her appeal in the Supreme Court of Illinois, but that Court found that the case was wrongfully taken there and transferred it to this court.

Plaintiff and the defendant, William G. Neilson, were married on April 21, 1951, at Ft. Benning, Georgia. They separated December 15, 1957. On July 27, 1958, in a suit for separate maintenance, the said City Court ordered Dr. Neilson to pay \$115.00 per week for support of his wife and two children.

In her complaint filed in the instant case on April 10, 1959, pursuant to waiver of the 60-day period, plaintiff alleged that she had always been a kind, dutiful and affectionate wife, but that the defendant had been guilty of extreme and repeated cruelty. Plaintiff prayed for a divorce, custody of the children, alimony, an apportionment of defendant's property, an order for payment of \$10,000 claimed to have been loaned by her to the defendant, and for an injunction restraining him from transferring his property or molesting plaintiff or the

to visit A. _____

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children. The injunction was ordered to issue without notice and without bond. In his answer defendant denied the allegations concerning her conduct, his cruelty, and the \$10,000 loan.

On May 1, 1959, plaintiff, Mr. R. Jack Ott as her attorney, defendant, and his attorney appeared in the City Court. Mr. Ott withdrew a petition for temporary fees and expense money and proceeded to trial on the complaint and answer. Mrs. Neilson's testimony as shown by about ten pages of transcript, supports the allegations with respect to her conduct and his extreme and repeated cruelty during the marriage, and discloses that two children, then aged seven and four years, had been born to the marriage. The balance of her testimony on direct and cross-examination indicates that the parties had agreed to disposition of their property rights. It was agreed that in lieu of alimony, she should receive the sum of \$15,000 including \$826 due her in the separate maintenance suit; that \$826 of such sum was payable on May 1 and the balance of the \$15,000 on June 1, 1959; that defendant would continue to pay \$115 per week until June 7; that she be awarded custody of the children, subject to his right to visit them at reasonable times and places; and that defendant pay \$100 per month for support of each child. The parties also stipulated that each would pay his or her own attorney's fees, that the amount of the settlement stand as a lien on defendant's interest in a pending estate; that his gross income for 1958 was \$20,455.99, and that his net income for that year was \$11,898. At the conclusion of the trial the judge announced that he found for the plaintiff, granted her a decree of divorce and approved the property settlement.

On September 2, 1959, the attorneys for the parties again appeared in the City Court and further stipulated that although defendant had made a conscientious effort to obtain the balance of the amount of the settlement, it was impossible for him to procure the amount necessary; that defendant had continued to pay \$115 per week after

children. The injunction was entered to issue with no notice and

without bond. In his answer defendant denied all allegations regarding

her conduct, his cruelty, and the illegitimacy of the children.

On May 1, 1932, plaintiff filed a motion for summary judgment.

Defendant, and his attorney, appeared at the hearing, Mr. Tolson

withdrew a petition for temporary injunction and a writ of habeas corpus

to trial on the complaint for recovery. The defendant's testimony in

shown by about ten pages of transcript. He testified that he

respect to her sanity, and his account and reputation were entirely

marriage, and disclosed that the defendant had been sane and sane

years, had been born of sane parents, the mother of sane children.

on direct and cross-examination, and that the parties had a good

to disposition of their property. He testified that he was

of alimony, and should receive the same as provided in the decree

her in the separate maintenance suit, and that such sum was

payable on May 1 and the balance of the same on June 1, 1932. That

defendant would continue to pay \$115 per week until June 1, 1932, and

he waived custody of the children, subject to his right to visit them

at reasonable times and places and that defendant pay \$115 per week

for support of each child. The parties also stipulated that each would

pay his or her own attorney's fees, and the amount of the settlement

stand as a lien on defendant's interest in a pending estate; that his

gross income for 1930 was \$2,450.93, and that his net income for

that year was \$1,938. At the conclusion of the trial the judge

announced that he found for the plaintiff, granted her a decree of

divorce and approved the property settlement.

On September 2, 1932, the attorneys for the parties again

appeared in the City Court and further stipulated that although defendant

had made a conscientious effort to obtain the balance of the amount of

the settlement, it was impossible for him to procure the amount

necessary; that defendant had continued to pay \$115 per week after

June 7; that there was then due plaintiff \$13,394.00; that defendant had borrowed and then could pay \$4394 of the amount of the settlement and could pay the balance amounting to \$9000 with interest at 5% per annum within nine months; that if not paid within nine months he would pay \$100 per month as an additional penalty; and that if plaintiff's attorney was not paid his agreed fee of \$2000 out of the \$4394 to be paid plaintiff on September 2, then defendant would pay the amount of the fee to plaintiff's attorney and the balance due plaintiff under the stipulation directly to her. The decree of divorce filed September 7, 1959, incorporates the substance of the foregoing stipulations and includes other provisions not complained of on this appeal.

On October 1, 1959, Mr. Stewart R. Winstein, who had been plaintiff's attorney in the separate maintenance suit, appeared for her in this action and filed a motion to vacate the divorce decree, stating that the decree had been procured by fraud and coercion and was contrary to law and against public policy and morals. The motion was supported by plaintiff's affidavit that on May 1 Attorney Ott and Mr. Robert Tunnel, one of her instructors at Bradley University and also an attorney, advised her to accept the \$15,000 settlement; that they told her that defendant might depart the jurisdiction and make it difficult to enforce the separate maintenance decree, and that if she did not accept the offer, she might "be taken out snipe hunting and be left holding the bag"; that during the trial she was frequently prompted to answer "Yes" by Mr. Ott and Mr. Tunnel; that she had rejected a previous offer of \$15,000 because she wanted cash so that she could return to her home in Columbus, Georgia, and purchase a home for her three children, two by the defendant and one by a previous marriage; that Mr. Ott told her that the \$15,000 cash was to be paid on June 7 and would be waiting for her upon her arrival in Georgia; that on June

James Y. that there was then due plaintiff \$15,000. Plaintiff
and defendant and then could pay \$5,000 of the amount of the settlement
and could pay the balance remaining to plaintiff in installments of \$2,000
annually within three months. If plaintiff failed to make these payments he
would pay \$10,000 more in an additional settlement. Plaintiff
plaintiff's attorney was not paid his bill for the settlement of the
\$15,000 to be paid plaintiff. Plaintiff's attorney was not paid his bill for
the amount of the fee for plaintiff's attorney and the balance due
plaintiff under the stipulation was not paid. Plaintiff's attorney
filed September 1, 1934, a motion for judgment on the stipulation
stipulations and motion under plaintiff's stipulations. Plaintiff's
attorney.
On October 1, 1934, plaintiff's attorney, who had been
plaintiff's attorney in the settlement, appeared for her
in this action and filed a motion to vacate the settlement, stating
that she thought had been paid to her and that she was entitled
to her share of the settlement. Plaintiff's attorney was not paid
by plaintiff's attorney that she was a plaintiff, but that she was
Theresa, one of her daughters to plaintiff's attorney and also her
attorney, advised her to accept the \$15,000 settlement; that they told
her that defendant might object to the stipulation and make it difficult
to enforce the separate settlement decree, and that if she did not
accept the offer, she might "be taken out into the country and be left
holding the bag"; that during the trial she was repeatedly prompted
to answer "Yes" by Mr. Ott and Mr. Tamm; and she had rejected a
previous offer of \$15,000 because she wanted more so that she could
return to her home in Columbus, Georgia, and purchase a home for her
three children, two by the defendant and one by a previous marriage.
That Mr. Ott told her that the \$15,000 cash was to be paid on June 7
and would be waiting for her upon her arrival in Georgia; that on June

19 she called Mr. Ott by telephone and told him that she wanted the divorce cancelled; that on June 20 she telephoned the trial judge about cancelling the divorce and he advised her that it could be done; that while enroute to Kewanee for a hearing on July 29 she had an accident about 250 miles from Columbus and sustained injuries which necessitated her return to Columbus for treatment; that she returned to Illinois on August 18; that when she went to court on September 2 she was crying and upset because she did not know the nature of the hearing; that as Mr. Ott signified agreement with defendant's attorney's statement of the stipulation, she interceded and stated that she wanted the divorce cancelled and refused payment of the \$15,000 in installments; that the judge admonished her that her outbursts were out of order; that Mr. Ott asked for a recess and took her from the court room for a conference; and that she refused to return to the court room and Mr. Ott told her that "the judge would take the bull by the horns and order a property settlement." In her affidavit plaintiff further stated that she phoned Mr. Winstein and made an appointment for the next day; that when she returned to the court room the hearing was over; that the judge denied that he told her that the decree could be cancelled; that she started to cry and everyone left, leaving her weeping in the court room all by herself; that she has never accepted any payments or benefits under the decree and had instructed her attorney to return defendant's check for \$4394.00; and that defendant has a lucrative medical practice and a one-fourth interest in a \$200,000 estate.

On October 1, 1959, plaintiff also filed a motion for change of venue. Thereafter defendant filed papers designated as resistances to the motions for change of venue and for vacating the decree. These motions and resistances came on for hearing on November 6 and were denied in an order entered on November 12. Defendant then filed a motion for an extended time to file counter-affidavits in opposition to the affidavit in support of plaintiff's motion to vacate the decree. Plaintiff filed a notice of appeal on November 28. On December 8 defendant filed Attorney Ott's affidavit in which he denied advising

[illegible]

the plaintiff concerning the hazards of hunting snipe and affirmed plaintiff's full knowledge of her rights and the terms of the settlement. From an affidavit made by defendant's attorney and filed with his motion for time to file counter-affidavits, it appears that there had been extensive negotiations between the attorneys for the parties prior to the filing of the complaint for divorce; that defendant intended to use an expected inheritance from his father's estate to pay the \$15,000 settlement, but because of tax problems it became impossible to make distribution in the estate; that a decree prepared by plaintiff's attorney in conformity with the trial held on May 2, 1959, was returned to him prior to June 7, but that he delayed forwarding the decree to the judge hoping that the \$15,000 would have been paid before entry of the decree; that defendant had received and retained the sum payable on May 1, 1959, and support payments through September 2, and that \$4394 paid her attorney on the latter date had never been returned to defendant. His motion for extended time to file counter-affidavits was allowed on December 8, 1959.

On appeal plaintiff complains considerably that the trial court erred in permitting defendant to file counter-affidavits after the court had heard her motion to vacate the decree and had announced his decision to deny the motion. It is contended that without these counter-affidavits, plaintiff's affidavit in support of her motion to vacate should have been accepted as true and therefore granted. Obviously, plaintiff could not have been prejudiced or the trial court influenced to permit the decree to stand by any new matter contained in the counter-affidavits, because the court's denial of the motion to vacate was announced on November 6, several days before either counter-affidavit was filed. After careful examination of the record we have concluded that consideration of the matters contained in the counter-affidavits is not necessary to a decision in this case, and consequently that there is no need to determine whether or not the court erred in permitting defendant to file such affidavits.

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Accepting the matters contained in plaintiff's motion to vacate and supporting affidavit as true, it does not follow that such matters were sufficient to warrant vacation of the decree. The evidence adduced at the trial on May 1 consisted entirely of plaintiff's testimony. There were no objections interposed, and no evidence to the contrary was produced. There is nothing in this record indicating that plaintiff was not adequately and competently represented by her own attorney at the trial and thereafter on September 2 when extensive stipulations pertaining to disposition of property rights were presented to the court. Excepting the time fixed for payment of the \$15,000, the decree entered was strictly in accord with plaintiff's testimony on May 1, and as to the time of such payment strictly in accordance with the further stipulation made by counsel for the parties on September 2.

In *Guyton v. Guyton*, 17 Ill. 2d 439, plaintiff testified by affirmative answers to leading questions by her counsel concerning the terms of an agreement adjusting property rights. One of the terms was that she was to receive \$15,000 cash in lieu of alimony. When the divorce decree was presented three weeks later, defendant's attorney objected on the ground that his client was unable to obtain an anticipated loan to pay plaintiff the \$15,000. After noting the objections the decree was entered by the court, and defendant appealed. In affirming the decree, the Court said that there was no merit to defendant's contention on appeal that the evidence of the agreement was adduced by "yes" or "no" answers to leading questions; that the law looks with favor upon the amicable settlement of property rights and is reluctant to disturb a decree based thereon; and that when such a settlement is made part of the decree, it becomes merged in the decree and the parties are concluded thereby.

Appellant contends that the decision in *James v. James*, 14 Ill. 2d 295, is applicable to the facts in this case. We think not. In that case the Court considered a settlement of \$25,000 on the wife

...the Court has consistently held that the law looks with favor upon the... and its refusal to... such a settlement is... degrees and the parties and consulted... appellate court... 14 Ill. 2d 325, is applicable to the facts in this case. I think not. In that case the Court manifested a settlement of \$25,000 on the wife

unfair and inequitable where she gave up her rights as a joint tenant worth \$21,500 and waived claim to her husband's assets totaling \$170,000. In the James case the trial judge erroneously told plaintiff and her counsel that she would have no claim by reason of her joint tenancy in the residence unless she had worked and contributed to its purchase. Also, the judge who heard the motion to vacate the decree considered the settlement so inequitable that he acted on his own volition and increased the amount agreed upon for child support from \$200 to \$300 per month, although the chancellor had represented at the trial that \$200 a month was the top allowance for such support.

In the instant case extensive arguments on the motion to vacate the decree, as shown by over thirty pages in the abstract, were presented to the trial judge, and he was unable to find any fraud, coercion or intimidation in procuring the settlement. Here there is no indication that plaintiff did not have full knowledge of her rights and the amount of defendant's property, or that she or her attorney were misinformed by the trial court as to her rights. We cannot say that an award of \$15,000 to the wife where the husband's property is valued at about \$50,000 and an allowance of \$200 per month for two children under the circumstances shown in this case, is so unfair as to make the settlement inequitable. Although the parties and their attorneys may have miscalculated the date when defendant would acquire his inheritance which would enable him to pay the amount of the settlement, there is no indication of any misrepresentation of any fact by the defendant or of any lack of good faith on his part in any of the negotiations for the settlement. We find no fraud or coercion in the procurement of the settlement and no error in the decree or in the trial court's denial of plaintiff's motion to vacate the decree.

Plaintiff also contends that the court erred in denying her motion for change of venue and that her motion to vacate the

decree was a "suit or proceedings" under the provisions of Ch. 146, Sec. 1, Ill. Rev. Stat. relating to change of venue in civil cases. However, the abstract of this motion shows only: "October 1, 1959. Motion for Change of Venue and proof of service, filed." Appellate Court Rule 6 requires that the abstract be sufficient to present fully every error relied upon. The substance of the motion for change of venue should have been abstracted so that this court would not be required to resort to the record to determine the sufficiency of the motion. The abstract is appellant's pleading in this court, and it should be something more than a mere index. 2 I.L.P. 443, 445, Appeal and Error Par. 481, 483. Although we may search the record to affirm, we are not required to go to the record to reverse. Rubinstein v. Fred A. Coleman Co., 22 Ill. App. 2d 116, 121. Plaintiff's contentions with reference to the trial court's denial of her motion for change of venue are not properly presented for review.

For the reasons indicated the decree of the City Court of Kewanee is affirmed.

Decree affirmed.

SMITH, P.J., and DÖVE, J., concur.

SMITH, P. L., and LOVE, J., 1960.

29#4

47899

HYMAN D. HEYMAN, ROY HEYMAN and
LEONARD HEYMAN, doing business as
Certified Shops,
Plaintiffs-Appellants

vs.

100 NORTH LA SALLE STREET BUILDING
CORPORATION, a corporation, GEORGE
R. CHADWICK and WALTER HALL,
Defendants-Appellees,

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

291A²⁶ 488

PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit to recover for damage by fire to plaintiffs' property, allegedly caused by negligent use of an acetylene torch by Hall and Chadwick. In the trial court several suits based on the fire were consolidated under the title Heyman, et al vs. 100 North La Salle Building Corporation, a Corporation, et al. This is the suit that was tried and we need not discuss the other suits. Plaintiffs dismissed Hall from the case at the trial. By stipulation the issues were separated and it was agreed that only in the event liability were determined would the damage issue be tried. At the close of plaintiffs' case the court directed verdicts in favor of Building Corporation and Chadwick, and entered judgments accordingly. Plaintiffs have appealed from the judgments.

Defendant Building Corporation is lessee and manager of the 100 North La Salle Street building on the northwest corner of La Salle and Washington Streets. Immediately to the west, separated only by a small alleyway, is the 166 West Washington Building, and immediately west of it, 170 West Washington Building. For convenience we shall refer to these two buildings.



2.

respectively, as 166 and 170.

The plaintiff, Finance Corporation, owns 170. Its tenants included Heyman and several other tenants, whose insurance claims were the basis of the other suits consolidated with the Heyman case.

Before 1953, Building Corporation owned 166 and arranged to sell heat to the 100 North La Salle Building. In 1954, a contract was made between Building Corporation and the then owners of 166, under which Building Corporation took over operation of the heating plant in 166. Subsequently, Building Corporation contracted to furnish heat to 170 from the 166 heating plant.

In the early morning of November 9, 1951 Chadwick engaged Hall, a welder, to enter the boiler room of 170 to cut an unnecessary heating pipe with an acetylene torch. The pipe led from the boiler at 166, through the west party wall, and terminated in 170. After the work progressed a short while, a fire, which caused the damage giving rise to this suit, was discovered.

The theory of plaintiffs' pleading is that Chadwick was agent of Building Corporation and that it was responsible for the damage which resulted from his alleged negligence in causing the fire. The trial court found no evidence that Chadwick was agent of Building Corporation, and none from which it could be inferred that Building Corporation could or should have known the work was inherently dangerous, so as to charge it for the alleged negligence of Chadwick in the role of independent contractor. The directed verdicts followed.



3.

The main issue here is whether there is any evidence to prove that Chadwick, at the time the work was being done, was the agent of Building Corporation. On this question of law we take only the evidence favorable to plaintiffs, draw inferences therefrom most strongly in plaintiff's favor, and disregard contrary and contradictory evidence. Kiriluk v. Cohn, 16 Ill. App. 2d 385, 386-87 (1958). Even though facts are undisputed, if there is room for drawing reasonable inferences to opposite conclusions, the question is for the jury. Westlund v. Kewanee Public Service Co., 11 Ill. App. 2d 10, 20 (1956).

Chadwick was retained by Building Corporation for "continuing" work and was paid on a monthly basis. He occupied an office in the 100 North La Salle Street Building. He was required to get permission to make repairs costing in excess of \$100. He was the only person engaged in the work that he was doing and was paid an additional sum each month for services as boiler fireman. He supervised the work of contractors engaged by Building Corporation, but the president of Building Corporation had "final right to control" on all the repairs. Chadwick, apparently, needed no permission to enter the 170 building, and acted as though he were Building Corporation's agent.

These are some of the elements that are to be considered in determining whether a relationship is that of agency or independent contractor. RESTATEMENT (SECOND), AGENCY § 220 (1958).

Upon the favorable evidence we have recited above, we think the jury could reasonably conclude that the total effect of all these indicia upon the average person would be the impression of



4.

agency. Chadwick testified: "Mr. Baldwin would have the final right to control on all these repairs regardless of whether they were large or small." Abs., p. 17. From this the jury could draw the significant inference that Building Corporation had a right to control "the means or appliances" and this would tend to indicate an agency relationship. Darner v. Colby, 375 Ill. 558, 561; Meredosia Levee District v. Industrial Commission, 285 Ill. 68, 71, (1918). We think the evidence was sufficient to take the case to the jury.

Building Corporation, in its brief, argues extensively upon the facts to show that Chadwick was an independent contractor. The facts in the argument, and the inferences from them, are unfavorable to plaintiffs and cannot be considered in reviewing a directed verdict even though they are not contradicted. Hectus v. Chicago Transit Authority, 3 Ill. App. 2d 439, 445 (1954); Thomas v. Douglas, 1 Ill. App. 2d 261 (1954).

Defendant relies on Ryan v. Associates Investment Co., 297 Ill. App. 544 (1938), wherein the court reviewed the elements which Professor Mechem set forth as proper factors for a court to take into consideration. There, the court affirmed a judgment for defendant notwithstanding a verdict for plaintiff. Each case, as the court there said, must stand on its own facts, and it is enough to say that the facts in the instant case are different from those in the Ryan case, and there is evidence of more of the relevant factors here, than the court there, had before it. In Westlund v. Kewanee Public Service Co., 11 Ill. App. 2d 10 (1956), also relied on by defendant, the question was whether a judgment

5.

for plaintiff should be reversed because he was an employee of defendants and as such precluded from recovery by reason of the provisions of the Workmen's Compensation Act. Plaintiff insisted he was an independent contractor. Just as, there, the Appellate Court thought there was sufficient evidence to take the question of independent contractor to the jury, we think, here, there was enough evidence to take the question of agency to the jury.

We see no merit in the contention of Chadwick that because Hall was dismissed at the trial the case against Chadwick must fall. The instant situation is not like those in the cases cited in support of the contention, where the agent and principal were sued and judgment was in favor of the agent and against the principal. Here, the theory of plaintiffs was that the work done by Hall was done for the Building Corporation through Chadwick. In support of the theory, plaintiffs introduced evidence tending to prove their case. It was not necessary that Hall be a party in order to make this showing.

Plaintiffs complain that the trial court abused its discretion in permitting the La Salle National Bank, Trustee, to intervene over plaintiffs' objections. Its arguments to support the contention are convincing. There are no counterarguments. The contention is met on the ground that the order permitting the intervention is not before this court because no appeal was taken from the order. Plaintiffs appealed from the judgments against them and brought before this court whatever orders were previously entered in the case to which it objected in the trial court.

6.

For the reasons given we hold that the trial court erred in directing verdicts for defendants and the judgments are reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BURMAN and MURPHY, J.J., CONCUR.

ABSTRACT ONLY.

297-4

47907

| | | |
|--------------------------------------|---|----------------|
| LA SALLE NATIONAL BANK, as Successor |) | |
| Trustee under Trust No. 4640. |) | APPEAL FROM |
| Plaintiff-Appellant, |) | |
| |) | SUPERIOR COURT |
| vs. |) | |
| |) | COOK COUNTY. |
| 100 NORTH LA SALLE STREET BUILDING |) | |
| CORPORATION, a corporation, |) | |
| GEORGE R. CHADWICK and WALTER HALL, |) | 2d |
| Defendants-Appellees. |) | |

PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

All parties agree in this court that the issues and evidence in this case are the same as those in Heyman, et al vs. 100 North La Salle Building Corporation, et al, No. 47899. In this case the trial court directed verdicts in favor of the defendants as it did in the Heyman case and the plaintiffs have appealed from the judgment. The Bank adopts the plaintiffs brief in No. 47899 as its brief in this case. The Building Corporation adopts those "positions" in its brief in No. 47899, which are concerned with the independent contractor relationship, as its brief in this case. Chadwick adopts as his brief, in this case, the brief filed for him in No. 47899.

For the reasons given in No. 47899, also filed this date, the judgments for the defendants in this case are reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

BURMAN and MURPHY, JJ., CONCUR.
ABSTRACT ONLY.



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| 1-11-87 | Allegretto | 736-3468 | |
| 1-15-74 | Mrs. L.C. Mitchell | | |
| 1-11-97 | McLennan | 332-0913 | |
| 1-11-97 | McLennan | 332-0913 | |

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